Zero-Carbon Energy for the Asia-Pacific Grand Challenge
ZCEAP Working Papers

ZCWP01-19 Public international economic law and private involvement in renewable energy trade and investment in the Asia-Pacific

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February 2019

EXECUTIVE SUMMARY

Over the next two decades, it is predicted that up to two-thirds of the world's energy demand growth will occur in the Asia-Pacific.[1] Of this growing energy demand, electricity will account for the largest share in the growth of final energy consumption. Meeting this demand with low-cost and low-carbon generation poses a massive challenge. There is broad-based agreement that it will not be possible without substantial private investment in what has traditionally been a publicly owned or controlled sector. Much of the necessary private involvement is likely to have an international trade or investment component. The purpose of the current paper is to assess the suitability of existing public international economic law to support private-sector participation in international renewable electricity trade and investment by ameliorating political risk.

Foreign direct investment (FDI) is expected to play an important role in the global transition toward zero-carbon energy in coming decades. FDI can help relieve capital constraints – lowering the cost of financing new projects. Higher FDI in the renewable energy sector can enable countries to leapfrog toward the technology frontier, avoiding investments in assets that will depreciate unnecessarily fast. FDI may also be embedded in energy trade projects.

International energy trade can help reduce costs to consumers and governments alike by exploiting economies of scale and comparative advantage. Energy trade has additional advantages for renewable energy because it leverages geographic diversity in both renewable generation and consumer demand – reducing the need for storage.

Both international trade and investment carry risks for private participants - risks which dampen investment. An important class of such risks is political risk, which arises from the potential for future adverse actions by governments. Infrastructure investments, such as electricity generation and supply, are by nature some of the most exposed to political risk. Political-risks potentially affecting the power sector are many and diverse, ranging from outright nationalisation, through changes in the policy or regulatory landscape, to civil unrest or conflict.

[1] IEA, 'World Energy Outlook (2018)' (IEA, 2018); IEA, 'World Energy Outlook (2017) Special Report: Southeast Asia Energy Outlook' (IEA, 2017).

The paper has surveyed relevant existing instruments of public international economic law, and noted the most pertinent aspects – both substantive and procedural – of this body of law. Trade rules, such as those encapsulated in the WTO's General Agreement on Tariffs and Trade were observed to suit the needs of the renewable energy industry poorly, and we join other authors in seeing a need for development of rules specific for energy trade. Though we have not seen formal legal analysis on the topic, our reading of the law is that similar limitations with regard to energy trade apply to regional trade rules, such as those in the AANZFTA.

The most important procedural component of public international economic law in our context is undoubtedly investor-state dispute settlement (ISDS), which allows foreign investors to bring disputes with host governments to international arbitral tribunals. Jurisdiction of these arbitral panels was observed to be hotly contended in some cases – particularly those involving Indonesia. Of the substantive clauses in these international agreements, minimum standards of treatment, especially fair and equitable treatment (FET) was observed to be one of those most favoured by investors and most contested by host governments and legal scholars alike. Altogether, the diversity of drafting and interpretation of the existing body of law does not appear to provide a particularly high level of certainty to either investors or host governments.

Whilst the *Energy Charter Treaty* (ECT) is ostensibly a multilateral treaty specifically designed to protect and promote international investment and trade in energy, it does not appear to be a tool supportive of renewable energy expansion in the Asia-Pacific. Firstly, key Asia-Pacific countries – including Australia, Indonesia and Singapore – have not ratified the treaty. Secondly, and perhaps more importantly, the ECT has been used more often to challenge renewable energy promotion laws and policies than to support renewable investments.

Our overall conclusion is that the existing body of international economic law is not particularly supportive of either governments considering policy innovation to support investment in renewable energy, or of private investors considering renewable energy projects in the Asia-Pacific. The challenge ahead, is to identify feasible alternatives that can do better.

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I. INTRODUCTION

The electricity system in the Asia-Pacific will need to evolve rapidly if it is to meet the twin objectives of affordably and reliably meeting demand growth whilst reversing the present trajectory of ongoing dangerous increases in greenhouse-gas emissions.[2] This transformation will require substantial increases in the contribution of both renewable electricity generation and private investment. These, in turn, require a substantial increase in cross-border trade and investment in the electricity sector.[3] Cross-border trade and investment in the electricity sector relies upon, and is ultimately underpinned by, effective legal frameworks. An assessment of the ability of existing public international law to support a substantial involvement of the private sector in cross-border energy trade and investment in the region is the subject of this discussion paper.

Growing incomes and populations in the Asia-Pacific have led to a massive increase in demand for electricity in the region. Three-quarters of projected global growth in energy demand in the next century is predicted to occur in this region, much of this will be electricity demand growth.[4] Meeting forecasted electricity demand in the Asia-Pacific in 2040 requires an increase in electricity supply equivalent to about half of current global electricity supply.[5] It is widely accepted that significant investment in electricity generation and supply will be required in the coming decades, and that much of that investment will be generated by the private sector.[6]
In light of the magnitude of projected demand growth in the Asia-Pacific,[7] it is clear that there is an imperative for the growth in supply to be dominated by low or zero-carbon generation if the world is to avoid dangerously high atmospheric carbon dioxide concentrations.[8]

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[2] IEA (2017) above n 1.
[3] UN ESCAP, above n 2; Priyantha Wijayatunga, D. Chattopadhyay and P. N. Fernando, 'Cross-border power trading in South Asia: A techno-economic rationale' (ADB South Asia Working Paper Series No 38, Asian Development Bank, 2015).
[4] IEA (2017) above n 1, 11.
[5] Calculation based on IEA (2017) above n 1, table 6.1 World Electricity Demand by Region and Scenario.
[66] Manuel Sanchez Miranda, 'Liberalization at the Speed of Light: International Trade in Electricity and Interconnected Networks' (2018) 21(1) *Journal of International Economic Law* 67, 69; see also Thomas Cottier and Ilaria Espa (ed), *International Trade in Sustainable Electricity: Regulatory Challenges in International Economic Law* (Cambridge University Press, 2017).
[7] Southeast Asia's energy demand is forecast to increase by two-third between 2017 and 2040: IEA (2017) above n 1, 11.
[8] According to the Intergovernmental Panel on Climate Change's Fifth Assessment Report, cross-sectoral investment low-carbon electricity and energy efficiency improvements is expected to grow by several hundred billion dollars every year before 2030: Intergovernmental Panel on Climate Change, 'Climate Change 2014: Synthesis Report Summary for Policy Makers' (Intergovernmental Panel on Climate Change, 2014) 30.

The private sector has played a growing role in recent new build energy infrastructure in the region, especially for renewable energy generation.[9] Compared to coal or nuclear power stations, renewable power stations can be relatively small-scale. Wind and solar also have fewer health and environmental risks than coal or nuclear. All of these features reduce the need for public sector involvement in renewable electricity generation compared to traditional power plants, opening the door for private-sector involvement. This may explain why three-quarters of global renewable energy investment is already private.[10]

Cross-border electricity trade reduces costs by taking advantage of economies of scale, time differences, as well as leveraging the comparative advantage of countries with varying resource endowments.[11] There are also operational cost savings to be made from reduced fuel costs, energy reserve margin sharing, potential avoided additional investment in peak capacity and the potential for merit-order generation where there is coordination between system operators.[12] Trade also helps to promote investment in renewable generation. Increased investment in intermittent renewable generating capacity is usually limited by system reliability constraints within a given operating system. Trade can smooth out reliability issues by diversifying the market of potential off-takers (especially in a spot-market), improve the capacity factor of installed renewable energy plants and justify further investment in renewable generating capacity.[13]

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[9] Sultan Hafeez Rahman et al, 'Energy Trade in South Asia: Opportunities and Challenges' (Asian Development Bank, 2012).
[10] IEA, 'World Energy Investment 2018' (IEA, 2018).
[11] Werner Antweiler, 'Cross-border trade in electricity' (2016) 101 *Journal of International Economics* 42; J. Scott Rogers and John G. Rowse, 'Canadian interregional electricity trade: Analysing the gains from system integration during 1990–2020' (1989) 11(2) *Energy Economics* 105; Govinda R. Timilsina et al, 'How Much Could South Asia Benefit from Regional Electricity Cooperation and Trade? Insights from a Power Sector Planning Model' (World Bank Policy Research Working Paper no. 7341, World Bank, 2015); Heymi Bahar and Jehnan Sauvage, 'Cross-Border Trade in Electricity and the Development of Renewables-Based Electric Power: Lessons from Europe' (OECD Trade and Environment Working Papers 2013/02, OECD, 8 April 2013); Pierre-Olivier Pineau, Anil Hirab and Karl Froschauer, 'Measuring international electricity integration: a comparative study of the power systems under the Nordic Council, MERCOSUR, and NAFTA' (2004) 32 *Energy Policy* 1457; Spyros Chatzivasileiadis, Damien Ernst and Göran Andersson, 'Global Power Grids for Harnessing World Renewable Energy' in Lawrence E. Jones (ed), *Renewable Energy Integration: Practical Management of Variability, Uncertainty, and Flexibility in Power Grids* (Elsevier, 2nd ed, 2017) 161.
[12] See generally Economic Commission for Africa, 'Assessments of Power Pooling Arrangements in Africa ' (Economic Commission for Africa, 2004); Govinda R. Timilsina et al, above n 12; Asami Miketa and Bruno Merven, 'Southern African Power Pool: Planning and Prospects for Renewable Energy' (Report, IRENA, 2013); see generally Musiliu O. Oseni and Michael Pollitt, 'Institutional arrangements for the promotion of regional integration of electricity markets: International Experience' (Energy Policy Research Group Working paper no 1408, University of Cambridge, July 2014).
[13] Heymi Bahar and Jehnan Sauvage, above n 12; Youngho Chang and Yanfei Li, 'Power generation and cross-border grid planning for the integrated ASEAN electricity market: A dynamic linear programming model' (2013) 2(2) *Energy Strategy Reviews* 153.

Foreign direct investment (FDI) is expected to play an important role in the global transition toward zero-carbon energy in coming decades, especially in developing countries which otherwise lack the necessary inflows of public finance and/or private capital.[14] Higher FDI in the renewable energy sector facilitates economies of scale, harnesses countries' comparative advantages in natural resource endowments and enables the transfer of rapidly changing technologies. Each of these factors can in turn promote efficiency and affordability for end-users. In the Asia Pacific, FDI is crucial to meeting energy demand growth without furthering reliance on fossil fuels. It may also contribute to interconnection projects.[15] The relevance of FDI to the renewable energy sector is demonstrated by the fact that it is already the third-largest source of foreign direct investment globally, totaling an estimated 77 billion USD in 2017.[16]

Finally, in many countries we are seeing a shift in domestic legal and policy frameworks specifically aimed at increasing the participation of so-called Independent Power Producers in the traditionally public sector-dominated electricity sector. Reforms have emphasized the role of market competition,[17] including unbundling vertically integrated electricity services (generation, transmission and distribution)[18] and the use of Public-Private Partnerships (PPPs).[19]

Altogether, these forces of change will add up in the coming decades to a transformation from a regional electricity infrastructure dominated by state-owned enterprises selling to domestic consumers, to one where private (often foreign) investors are involved in generation and cross-border supply. This transformation will place a whole new set of demands on legal frameworks for electricity generation and supply across the region. The current paper describes existing frameworks and assesses their ability to meet the needs of the various stakeholders in a new, internationalized electricity system. We will pay particular attention to a case-study of private generation of 100% renewable electricity in northern Australia, with potential to supply to Indonesia and possibly Singapore via subsea cables.

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[14] Alexander Ryota Keeley and Ken'ichi Matsumoto, 'Relative significance of determinants of foreign direct investment in wind and solar energy in developing countries' (2018) 123 *Energy Policy* 337.
[15] See, e.g., Yanfei Li and Youngho Chang, 'Infrastructure investments for power trade and transmission in ASEAN+2: Costs, benefits, long-term contracts and prioritized developments' (2015) 51 *Energy Economics* 484.
[16] Keeley and Matsumoto, above n 14.
[17] Paul L. Joskow, 'Electricity Sectors in Transition' (1998) 19(2) *The Energy Journal* 25, 25-52.
[18] Tooraj Jamasb, Rabindra Nepal and Govinda R. Timilsina, 'A Quarter Century Effort Yet to Come of Age: A Survey of Power Sector Reforms in Developing Countries' (Policy Research Working Paper No. 7330, World Bank, June 2015) 4.
[19] Ibid.

International Energy Agency (IEA) projections demonstrate that electricity demand in Southeast Asia will continue to grow exponentially over the next two decades.[20] *The timely deployment of cost-competitive renewables-based power generation is key to meeting this demand without the addition of new coal-fired generation capacity.*[21] *To that end, the role of Australia's abundant renewable resources is coming into increasingly sharper focus.*[22] *In 2014, a site search and feasibility study commenced for the Asian Renewable Energy Hub (AREH) project in the Pilbara, Western Australia. The AREH project, which now has major project status from the West Australian Government, proposes to harness the region's comparative advantage in wind and solar resources for annual export of up to 20TWh of renewable electricity to Indonesia and Singapore via two subsea high-voltage direct current (HVDC) cables of 1.5 GW each. The project is currently supported by a growing consortium of industry developers, and, if realised, has the potential to develop into one of the world's largest power generation projects to date.*[23] *In addition to addressing the challenge of decarbonising Southeast Asia's growing electricity market, the AREH project offers a potential pathway for sustainable economic development in the Pilbara region.*[24]

II. LINKED ISSUES IN INTERNATIONAL TRADE AND INVESTMENT

Before beginning our analysis, it is worthwhile clarifying both what we mean by international trade and investment and which "problems" for private foreign investors may be ameliorated by public international economic law. Here we take a primarily economic approach to defining these problems.

[20] IEA (2017) above n 1, 11.
[21] Ibid, 23.
[22] See, e.g., Edward Halawa et al, 'The Prospect for an Australian–Asian Power Grid: A Critical Appraisal' (2018) 11(1) *Energies* 200, 201.
[23] Asian Renewable Energy Hub, *About the Asian Renewable Energy Hub* (2017) <https://asianrehub.com/about/>.
[24] Samatha Mella, Geoff James and Kylie Chalmers, 'Pre-Feasibility Study: Evaluating the Potential to export Pilbara Solar Resources to the Proposed ASEAN Grid via a Subsea High Voltage Direct Current Interconnector' (Report, Pilbara Development Commission, 2017) 93.

International trade and investment

Very simply, international trade in electricity occurs when a firm in one country produces electricity that is used or sold in another. For example, the proposed Asian Renewable Energy Hub export of renewable electricity from Australia to Indonesia via HVDC cable would involve international electricity trade.

International investment in electricity occurs when a firm owned in one country invests in the generation, transmission, distribution or supply of electricity in or through another country and its maritime Exclusive Economic Zone (EEZ). These investments could be wholly foreign-owned – as in the case of Vattenfall's (Swedish) nuclear power plants in Germany – or they could be joint ventures. Joint ventures between private foreign companies and state-owned corporations are a ubiquitous feature of the energy sector in many countries in the region.

Importantly, international electricity trade will often involve an element of international investment. Even if the generation assets are located in the home country, at the import destinations there will be a need for a transmission corridor on land, as well as a substation where the electricity is received. This would be the case, for example, if the AREH consortium owns (at least in part) the high-voltage DC (partly sub-sea) cable connection to Indonesia and associated infrastructure such as substations, transformers and transmission assets on the Indonesian side in order to connect to the Indonesian grid.

For this reason, investments which are primarily aimed at electricity trade may be able to avail themselves of legal rights afforded to international investors. As will be clear below, public international economic law provides stronger protections (including access to investor-state-dispute settlement) for international investment than for trade alone.

Market access versus political risk

Broadly speaking, government actions can cause two classes of problem for private investors wishing to engage in international electricity trade and investment. One is to limit market access or in some way create an unfair playing field tilted toward domestic incumbent operators – thus preventing the entry of exporters or foreign firms into the domestic market. The other is to change the operating environment of a firm after they have invested – generating political risk for the investor. Legal solutions to the former problem are referred to as "market liberalizing", while those for the latter problem constitute "investment protection".

Market access may be constrained through mechanisms such as tariffs, bans, limits on foreign ownership and joint venture requirements. The limiting effect of such measures on private involvement in international trade and investment are often quite obvious. In many cases, however, private involvement remains well below that which would be allowable under government policy on market access. The reason for this is that investors' expected profits are curtailed by political risk.

An economic understanding of political risk in international trade and investment

In this paper, we consider the role of existing public international economic law in supporting private investment in cross-border electricity trade and investment in the Asia-Pacific. We therefore begin with a consideration of the various barriers to private participation that can potentially be ameliorated by international public law. Since public law is primarily about relations among governments or between governments and private investors (see beginning of Section III), these problems essentially all fall under the category of political risk.

Political risk arises when there is the potential for the investor to face losses due to government actions that occur after an investment (or part thereof) has been made. There are two broad reasons why government actions after an investment might differ from those promised prior to the investment being made: dynamic inconsistency of optimal policy, and new information.

Dynamic inconsistency of optimal policy can arise because prior to investment governments have incentives to offer favourable conditions to attract investors, while post investment the government may have the incentive to capture as much as possible of the value of the investment. In other words, dynamic inconsistency problems can lead to expropriation of all or part of an investors asset. Nationalisation of an investment is the most obvious example of this. Such outright forms of expropriation have been relatively rare in the past few decades due to the substantial impact they have on the reputation of a government. None-the-less there have been a couple of cases of such in the electricity sector.[25]

Expropriation may also be "creeping" or "indirect". Examples of this include post-investment changes by the government to the firm's operating environment that allow the government to capture more of the value of the firm's investment than previously agreed. In the case of electricity trade and investment, the most pertinent of these actions by the state are decisions to pay less than the contracted price for electricity from the investor.[26] Retroactive incentive reductions and windfall taxes are financial mechanisms that have also been used by states to interfere with renewable energy investments. Governments may levy windfall taxes when an industry experiences a "windfall gain". Such measures have been introduced in Spain, Greece and the Czech Republic's solar industry, as well as other energy markets around the world, and represent a risk to international and domestic investors alike.

New information represents a subtly but importantly different source of political risk.[27] Government responses to new information can lead to losses for the private investor without involving the government "capturing" more value from the investment. Key examples are if a government utility refuses to buy the previously contracted amount of electricity from a firm due to a change in political circumstances, or if a government withdraws rights to invest in response to new information about environmental consequences. In these cases, the government is not "capturing" more of the value of the firm's investment than previously agreed (hence it is not a form of indirect expropriation), but it is still a major political risk for the firm.

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[25] See, eg, *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia (Award (corrected))* (Permanent Court of Arbitration, Case No. 2011-17, 21 January 2014); *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan (Award)* (ICSID Arbitral Tribunal, Case No. ARB/13/1, 22 August 2017). Several cases where direct expropriation was alleged have been settled. See, eg, *Iberdrola, S.A. and Iberdrola Energía, S.A.U. v Plurinational State of Bolivia* (Permanent Court of Arbitration, Case No. 2015-05, 2014); *Red Eléctrica Internacional S.A.U. v Plurinational State of Bolivia* (Settled, 13 November 2014); *AbitibiBowater Inc. v Government of Canada (Consent Award)* (ICSID Tribunal, Case No. UNCT/10/1, 15 December 2010). Several cases also alleged direct expropriation, however jurisdiction was ultimately declined. See, eg, *Libananco Holdings Co. Limited v Republic of Turkey (Award)* (ICSID Arbitral Tribunal, Case No. ARB/06/8, 2 September 2011) ('*Libananco (Award)*'); *Empresa Electrica del Ecuador, Inc. (EMELEC) v Republic of Ecuador (Award)* (ICSID Arbitral Tribunal, Case No. ARB/05/9, 2 June 2009); *Cementownia "Nowa Huta" S.A. v Republic of Turkey (I) (Award)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/06/2, 17 September 2009).

[26] *Yukos Universal Limited (Isle of Man) v Russian Federation (Award)* (Permanent Court of Arbitration, Case No. AA 227, 18 July 2014) ('*Yukos v Russian Federation (Award)*')

[27] For a thorough discussion of this distinction and its implications for the design of compensation mechanisms in international law, see Emma Aisbett and Jonathan Bonnitcha, 'Compensation under Investment Treaties – As if Host Interests Mattered' (UNSW Law Research Paper No. 18-80, 2018).

Of course, in reality government actions may be motivated by a combination of dynamic inconsistency and new information. A pertinent example in the context of renewable energy is changes to feed-in tariffs. Feed-in tariffs may be reduced by governments ostensibly in response to new information about the price of solar panels, while part of the government's motivation is to capture a greater share of the value of existing solar investments.

It is important to note that these political risks can apply independently of whether any investment has actually taken place in the offending government's territory. For example, if an investor builds an electricity generation plant in one country, with the specific aim of exporting to another, they will usually have contracts with the foreign governments[28] about quantity and price of electricity to be sold over part or all of the investment's lifetime.[29] If the importing government decides they no longer wish to purchase the full contracted amount – the project suffers losses due to stranded assets in the same way as they would if the investment had taken place within the importing country. If the importing government decides they no longer wish to pay the agreed price – the firm has been exposed to indirect expropriation just as much as one located in the importing country. As will be seen below, this observation is important because international economic law provides much greater protection against political risk to international investors than to international exporters.

Discrimination

Another important concept in this context is discrimination. The premise underlying almost all public international economic law is that governments have a tendency to discriminate against foreign market participants in favour of domestic ones. From an economic perspective, bias or discrimination may be an important underlying cause – but restrained market access and political risk are the actual problems. None-the-less, as will become clear below, non-discrimination is one of the central tenets of public international economic law.

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[28] In this paper, we use the term "government" to also encompass State-Owned Enterprises (SOEs). This is because in many countries SOEs still exert a dominant influence over countries' electricity sectors, and therefore international energy investors invariably deal with SOEs. Under international law, the actions of SOEs may in some circumstances be attributed to the Government of a State, attracting state responsibility.

[29] Whilst contracts may be made directly with non-government energy users in the relevant country, our focus in this paper is on agreements made between foreign investors and governments or their agencies. This is because in many countries electricity sectors are not unbundled, and therefore in order to sell electricity to the grid IPPs must often sell to state owned utilities.

III. RELEVANT INTERNATIONAL PUBLIC ECONOMIC LAW

What is Public International Law?

Public international law, often simply called international law, refers to the body of law that governs the conduct of nation states, and other subjects of international law. These subjects, which may include international organisations and other non-state entities, possess so called 'international legal personality', which means they possess international duties and obligations.[30] The development of international investment law has contributed to the development and recognition of the international legal personality of multinational enterprises.[31] International economic law frameworks, such as investment agreements/bilateral investment treaties (BITs) also confer rights upon corporate entities of a contracting state party. As such, corporations active across national jurisdictions are availed of international rights and duties under these frameworks. Sources of public international law are exhaustively identified in Art 38(1) of the *Statute of the International Court of Justice* to include treaties, international custom, general principles of international law, and judicial decisions and the writings of the most highly qualified publicists as a subsidiary means of determining the rules of law.[32]

Public international law may be distinguished from supranational law, which is developed by international organisations that have competence to enact binding legal rules,[33] such as the European Union. It is also distinguishable from private international law, which mainly determines which set of laws will apply to resolve legal matters between individuals (natural and legal persons) across national boundaries;[34] for example, the interpretation and enforcement of transnational contracts.

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[30] Alina Kaczorowska-Ireland, *Public International Law* (Taylor and Francis, 5 ed, 2015); Oxford Public International Law, *Max Planck Encyclopedia of Public International Law,* (at May 2007) 'Subjects of International Law'.

[31] See e.g. *Convention on the settlement of investment disputes between States and nationals of other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*') art 25; see also decisions of the International Court of Justice *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 [38-47]; *Ahmadou Siado Diallo (Republic of Guinea v Democratic Republic of Congo) (Preliminary Objections)* [2007] ICJ Rep 20 [61] cited in Oxford Public International Law, *Max Planck Encyclopedia of Public International Law,* (at June 2014) 'Corporations in International Law'.

[32] *Statute of the International Court of Justice* art 38(1).

[33] Oxford Public International Law, *Max Planck Encyclopedia of Public International Law*, (at November 2006) 'International Law'.

[34] Oxford Public International Law, *Max Planck Encyclopedia of Public International Law,* (at January 2008) 'Private International Law'.

In this paper, we focus on public international economic law frameworks relevant to international electricity trade in the Asia-Pacific region. We will not be considering issues that predominantly relate to the application of private international law. This includes decisions of ad-hoc commercial arbitral tribunals arising from dispute settlement clauses in private commercial contracts. We will also not be considering other aspects of public international law which are otherwise relevant to the topic of international power trade and investment, such as the law of the sea[35] and international environmental law.[36] We none-the-less acknowledge that international environmental law necessarily interacts with international trade law in a variety of complex ways, especially in the context of renewable energy.

General Agreement on Tariffs and Trade and other World Trade Organization Rules

At a multilateral level, the *General Agreement on Tariffs and Trade* (GATT) and other agreements under the auspices of the World Trade Organization (WTO)[37] provide a broad international framework for freer trade and economic cooperation between country Parties. International economic rules governing cross-border electricity trade and investment are drawn from the GATT 1947 and 1994, the *Subsidies and Countervailing Measures* (SCM) Agreement, the *Trade Related Investment Measures* (TRIMs) Agreement, the *Technical Barriers to Trade (TBT) Agreement* and the *Agreement on Government Procurement*.[38] Crucially, Art V of the GATT obliges WTO members to provide for freedom of international transit 'via the routes most convenient';[39] an obligation that extends to cross-border electricity transit.[40]

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[35] Donald R. Rothwell and Tim Stephens, *The International Law of The Sea* (Hart Publishing, 2nd ed, 2016).
[36] Philippe Sands et al, *Principles of International Environmental Law* (Cambridge University Press, 4th ed, 2018).
[37] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*'); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 14 (entered into force 1 January 1995) annex I ('*Agreement on Subsidies and Countervailing Measures*').
[38] *Agreement on Subsidies and Countervailing Measures*; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 U.N.T.S. 186 (entered into force 1 January 1995) annex 1A ('*Agreement on Trade-Related Investment Measures*'); Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1868 U.N.T.S. 120 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*'); Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1915 U.N.T.S. 105 (entered into force 1 January 1996) annex 4 ('*Agreement on Government Procurement*'); Yulia Selivanova, 'The WTO and Energy: WTO Rules and Agreements Relevant to the Energy Sector' (ICTSD Issues Paper no. 1, International Centre for Trade and Sustainable Development, August 2007).
[39] *General Agreement on Tariffs and Trade (1947)*, opened for signature 30 October 1947, 55 U.N.T.S. 194 (entered into force 1 January 1948) ('*GATT (1947)*').
[40] Alan Yanovich, 'WTO rules and the energy sector' in Yulia Selivanova (ed), *Regulation of energy in International Trade Law: WTO, NAFTA and Energy Charter* (Wolters Kluwer, 2011) 1, 26-27.

Electricity is, however, unique insofar as it cannot be traded in the same manner as most other products[41] and encompasses a specific set of political, economic and legal issues.[42] It is widely understood that GATT/WTO rules (such the most favoured nation principle and the requirement of national treatment), which were not historically drafted with international energy trade in mind, often fail to provide redress for trade-related issues specific to the energy sector.[43] Energy export barriers are, for example, more common than energy import barriers, whereas the inverse is generally true in relation to other industries.[44] GATT/WTO rules are primarily designed to facilitate trade by reducing import barriers such as tariffs and quotas,[45] leaving something of a governance gap for the imposition of domestic barriers to energy exportation.

The WTO's broad-brush emphasis on reducing import barriers to trade has also contributed to the growing number of international trade disputes relating to the domestic treatment of renewable technologies. Government fiscal support in the form of subsidies, broadly designed to accelerate the uptake of renewable energy, have been successfully challenged for a variety of reasons under the *GATT*, *SCM Agreement* and *TRIMS Agreement* to date.[46] The WTO regime has come under fire in several instances for its apparent failure to balance trade and environmental concerns;[47] accused of having an 'environmental blind spot'[48] in respect of Art XX(g) of the GATT, which exempts measures from GATT rules if they relate to the conservation of exhaustible natural resources.[49] To exacerbate this issue, the SCM Agreement,

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[41] Electricity trade can require substantial upfront investment in infrastructure. The AREH project would, for example, involve the construction of HVDC undersea power cables and convertor stations: Asian Renewable Energy Hub, *About the Asian Renewable Energy Hub* < https://asianrehub.com/about/>.
[42] See Timothy Richards and Lawrence Herman, 'World Trade Report 2010: Trade in Natural Resources' (World Trade Organization, 2010).
[43] Energy Charter Secretariat, *WTO Rules and Sustainable Energy Policies* (1 November 2006) <<https://www.ictsd.org/bridges-news/bridges/news/wto-rules-and-sustainable-energy-policies>>; Vladimir Rakhmanin, 'Transportation and Transit of Energy and Multilateral Trade Rules: WTO and Energy Charter' in Joost Pauwelyn (ed), *Global Challenges at the Intersection of Trade, Energy and the Environment* (Centre for Economic Policy Research, 2010) .
[44] For example, in 2004 the Argentine Government passed regulations effectively abrogating Argentina's energy export commitments with Brazil and other Southern Cone countries due to a national energy deficit. This resulted in a breach of contract between the Argentine Government and a Brazilian company, CIEN, in relation to the Garabi interconnector: see especially Economic Consulting Associates, The Potential of Power Sector Integration: Argentina Brazil – Transmission and Trading Case Study' (Report, January 2010)
[45] Yulia Selivanova, above n 38.
[46] See, for example, Appellate Body Report, *Canada–Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R (24 May 2013); Appelate Body Report, *Canada–Measures Relating to the Feed-In Tariff Program*, WT/DS426/AB/R (24 May 2013).
[47] Paulo Davide Farah and Elena Cima, 'World Trade Organisation, Renewable Energy Subsidies and the Case of Feed-in Tariffs: Time for Reform Toward Sustainable Development?' (2015) 27(1) *Georgetown International Environmental Law Review* 515.
[48] Ibid.
[49] *GATT (1947)* art XX.

which sets out the rules relating to subsidies, does not contain an equivalent environmental exception and is not subject to Art XX of the GATT;[50] potentially leaving green subsidies (including feed-in tariffs) without recourse to a defence that is available for other trade-distortive measures.[51] If nothing else, this arbitrary inconsistency sits at odds with the fundamental need for the WTO to appropriately and consistently balance competing interests. This need is clearly espoused in the text of the Preamble to the *Marrakesh Agreement Establishing the WTO*, which refers to ensuring the 'optimal use of the world's resources *in accordance with* the principle of sustainable development'.[52]

It should also be noted that it is not yet a matter of settled law whether GATT/WTO obligations extend to the cross-border trade of electricity between privately owned and operated entities.[53] This uncertainty stems from the unique nature of electricity in international trade,[54] and more especially, from the fact that the sector has historically been dominated by State owned or controlled utilities.[55] **In the context of a mounting climate change crisis,[56] the introduction of new rules and disciplines specific to cross-border renewable energy trade has been suggested as a potential long-term solution to the myriad policy challenges and ambiguities that arise in this space under the current regime.[57]**

Operation of GATT/WTO rules in the AREH case study

Australia and Indonesia are WTO members and are thus bound by GATT/WTO rules, which apply to trade in renewable electricity.[58] As the off-take, transmission and distribution of

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[50] In their amicus curiae submission to the WTO Panel for *Canada – Certain Measures Affecting the Renewable Energy Sector* (DC412), the International Institute for Sustainable Development (IISD), the Canadian Environmental Law Association (CELA) and Ecojustice Canada argue that Art XX of the GATT should be applicable to the SCM Agreement, to ensure that sustainable development is taken into account by the WTO Panel as a legitimate policy objective: see International Institute for Sustainable Development (IISD), Canadian Environmental Law Association (CELA) and Ecojustice Canada (Ecojustice), 'Amicus Curiae Submission', Submission in *Canada – Certain Measures Affecting the Renewable Energy Sector*, DS412, 10 May 2012.
[51] Ibid 6.
[52] Preamble, *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) [emphasis added].
[53] See especially Danai Azaria, *Treaties on transit of energy via pipelines and countermeasures* (Oxford University Press, First ed, 2015).
[54] Yulia Selivanova, above n 38.
[55] World Trade Organisation, *Energy Services* <https://www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm>.
[56] IPCC, 'Global Warming of 1.5 °C: An IPCC Special Report on the Impacts of Global Warming of 1.5 °C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways' (IPCC, 6 October 2018). Ibid.
[57] See especially Thomas Cottier, 'Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?' (2014) 1 *Renewable Energy Law and Policy* 40.
[58] World Trade Organization, *Members and Observers* <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

electricity in Indonesia is monopolised by a State-owned enterprise, PT Perusahaan Listrik Negara Persero (PLN), the Indonesian Government's involvement in the proposed AREH project is manifest. (In addition, Indonesia would need to consent to the transit of its territory and maritime EEZ by a subsea HVDC cable). Whether the Australian Government could play a substantive role in facilitating such a project remains somewhat less apparent at the time of writing. Hypothetically, if Indonesia were to introduce a law or regulation that resulted in PLN contravening or defaulting on its AREH energy import commitments in a manner that also potentially amounted to a breach of GATT/WTO rules, the question of whether Australia might challenge Indonesia at the WTO level is an inherently political one, and would also be dependent on the nature of the alleged offending measure. These same considerations would apply were Indonesia to challenge an Australian subsidy on renewable energy technologies (such as a State level feed-in tariff in Western Australia or the support provided (up to 2020 and possibly beyond) by the renewable electricity certificates mechanism of the Renewable Energy (Electricity) Act 2000 (Cth), by reference to the SCM Agreement, for example. The WTO dispute settlement system is primarily designed to discourage the introduction of new barriers to trade between country Parties by providing for the imposition of retaliatory countermeasures in accordance with recommendations and rulings made under the auspices of the WTO's Dispute Settlement Body.[59] *The WTO does not, therefore, provide investors (private or otherwise) with a right to compensation for losses flowing from a breach, though a WTO ruling or recommendation in favour of an investor's home country may, if relevant, carry some weight in other international dispute resolution fora, such as investor-state arbitration. It follows that while the WTO regime could afford the proposed AREH project some important international trade protections (such as freedom of transit),*[60] *it plays a relatively indirect role in the governance of foreign energy-related investments.*[61]

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[59] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), art II.1 ('Scope of the WTO'): 'The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.'
[60] *GATT (1947)* art V.
[61] Natasha Georgiou (Energy Charter Secretariat), 'A Rule-based Architecture for the Energy Sector' (Occasional Paper Series, Energy Charter Secretariat, 2016) 5.

The Energy Charter Treaty

Separate to, but building upon WTO rules,[62] a key international law framework for international energy trade and investment is the *Energy Charter Treaty* (ECT).[63] The ECT was concluded in 1998 and was preceded by the *European Energy Charter* of 1991.[64] It remains the only multilateral instrument under international law with a subject-matter restricted to energy governance and cooperation between Contracting Parties (countries that have ratified the ECT).[65] There are currently 52 ECT signatories/Contracting Parties.[66]

With respect to trade, the ECT comprises key provisions designed to promote freer energy transit and enable greater energy market integration between Contracting Parties in a manner that fosters energy security and efficiency.[67] To that end, the Charter most notably builds upon the core GATT/WTO principles of non-discrimination (MFN and national treatment), reciprocity and secure transit between its Members.[68]

The ECT is perhaps best known for the extensive and controversial protection it offers investors of Contracting Parties through the inclusion of a binding ISDS mechanism, which has been invoked more than any equivalent mechanism in any other international trade or investment promotion and protection agreement by the energy industry to date.[69] Furthermore, the ECT's dispute settlement mechanism has resulted in some of the largest ISDS awards in arbitral history.[70] The function of the ECT's investment provisions and ISDS mechanism are examined in greater detail in section IV of the paper (Investor-State Dispute Settlement).

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62 Ibid 11.

63 *The Energy Charter Treaty,* opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) ('*The Energy Charter Treaty'*).

64 Energy Charter Secretariat, *The Energy Charter Treaty* (9 April 2015) <https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>.

65 Energy Charter Secretariat, 'The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation' (Energy Charter Secretariat, 2004) 13.

66 Energy Charter Secretariat, *Constituency of the Energy Charter Conference* (25 January 2018) <https://energycharter.org/who-we-are/members-observers/>.

67 Kaj Hobér, 'The Energy Charter Treaty: An Overview' (2007) 8(3) *Journal of World Investment and Trade* 323.

68 Natasha Georgiou, above n 61, 12–13.

69 As at 18 May 2018, there were a total of 144 investment disputes under the ECT, 66 of which were pending and only 3 of which had been discontinued or withdrawn: Energy Charter Treaty, *Changing dynamics of investment cases under the Energy Charter Treaty* <https://energycharter.org/what-we-do/dispute-settlement/cases-up-to-18-may-2018/>.

70 For example, USD 50 billion was awarded against Russia in the high-profile case of *Yukos v Russian Federation (Award) (Permanent Court of Arbitration, Case No. AA 227, 18 July 2014).*

Australian and Indonesian Participation in the ECT

Australia has signed but not ratified the ECT, while Indonesia, Singapore and ASEAN remain observers only.[71] *Consequently, at the time of writing, the AREH project could not be afforded ECT protection. While the ECT represents a possible way forward for the future governance of energy connectivity and energy-related foreign investment in the Asia Pacific, its architecture is not without risks and certain limitations. In particular, the effects of the ECT's dispute settlement provisions on State sovereignty and renewable investment flows need to be properly explored before States such as Australia and Indonesia fully accede to it.*[72]

Plurilateral and Bilateral Instruments for the case of Australia and Indonesia

For investment and trade between Indonesia and Australia, two agreements are relevant to consider. The first is the Bilateral Investment Treaty (BIT) between Australia and Indonesia, which came into force in 1993[73] for a period of 15 years, and which has been automatically renewed for the same period as provided for in the agreement.[74] The second is the *ASEAN-Australia-New Zealand Free Trade Agreement* (AANZFTA),[75] which for our purposes, fully came into force in when Indonesia implemented the agreement in January 2012 (noting that Indonesia was the only Party to that agreement not to ratify its *First Protocol* in 2015).[76]

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[71] Energy Charter Secretariat, above n 64.

[72] *The Energy Charter Treaty*, *art 26;* see especially Kyla Tienhaara and Christian Downie, 'Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes' (2018) 24(3) *Global Governance* 451.

[73] *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments*, *and Exchange of Letters*, signed 17 November 1992, [1993] ATS 19 (entered into force 29 July 1993) ('*Australia-Indonesia Bilateral Investment Treaty*').

[74] Ibid art XV. It is worth noting that the future of the BIT at this stage is the subject of much conjecture. Indonesia has recently indicated a shift in its foreign investment policy by announcing the termination of certain BITs with third countries and expressing an intention to re-negotiate others. See generally Abdulkadir Jailani (Director for Treaties of Economic, Social and Cultural Affairs, Ministry of Foreign Affairs, Republic of Indonesia) 'Indonesia's Perspective on Review of International Investment Agreements' (South Centre Investment Policy Brief no. 1, South Centre, July 2015) <<https://www.southcentre.int/category/publications/policy-briefs/>>; David Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?' (2018) 7(1) *Asia Journal of International Law* 124; ibid; Leon Trakman and Kunal Sharma, 'Indonesia's Termination of the Netherlands – Indonesia BIT: Broader Implications in the Asia-Pacific?' on *Kluwer Arbitration Blog* (21 August 2014) <http://arbitrationblog.kluwerarbitration.com/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/>. We discuss this issue in a follow up paper.

[75] *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, opened for signature 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ('*ASEAN-Australia-New Zealand Free Trade Agreement'*).

[76] *Peraturan Presiden Republik Indonesia no .26/2010 tentang Pengesahan Persetujuan Pembetukan Kawasan Perdagangan Bebas ASEAN-Australia-Selandia Baru* [Presidential Regulation of the Republic of Indonesia no. 26/2010 concerning the

Trade-based Protections

The AANZFTA investment and trade in goods chapters provides broad protections for trade by incorporating other WTO disciplines. These include non-discrimination provisions (most favoured nation and national treatment),[77] prohibitions on quantitative restrictions, and behind the border measures,[78] including prohibitions on performance requirements,[79] which are governed by the *Agreement on Trade Related Investment Measures* (TRIMS). An illustrative list of investment measures that will be found to be inconsistent with the GATT articles III.4 and XI are included in an annex to the TRIMS agreement. For example, inconsistent measures may include requirements for investors to fulfil certain domestic content minimums. Unlike the GATT, the AANZFTA does not oblige freedom of transit, however does include provisions for the 'expeditious clearance of goods'[80] and the movement of natural persons[81] to facilitate trade and investment. The issues discussed above concerning the application of WTO/GATT disciplines to cross-border energy investment also apply here.

Investment-based Protections

Both the AANZFTA and the BIT extend some support to cross-border investment. Both provide a broad definition of 'investment', covering 'every kind of asset'[82] owned, controlled and invested by the investor. However, the BIT includes a catch-all clause which bring 'activities associated with investments' within the scope of 'investment'.[83] 'Investments' that fall within the scope of protection of the BIT and the AANZFTA are those admitted in conformity with the laws, regulations and policies of the host government.[84]

Ratification of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area] (Indonesia) 6 May 2011, LNRI 55 ('*Presidential Regulation of the Republic of Indonesia no. 26/2011*').

[77] Ch 11, art 4; Ch 2, art 4. The BIT also includes a Most Favoured Nation (MFN) clause which provides for equal treatment of the relevant investments as accorded by the host government to investments of third countries from time to time subject to certain conditions: Australia-Indonesia BIT (article VI).

[78] Ch 2, art 7.

[79] Ch 11, art 5.

[80] Ch 4, art 4(1).

[81] Ch 9.

[82] *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11 art 2(c); *Australia-Indonesia Bilateral Investment Treaty* art 1 (a).

[83] Article 1(a)(vi). '…such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, and the raising of funds including purchase and sale of foreign exchange'. Note, understandings at the end of the Australia-Indonesia BIT clarify that efforts would be made to broaden the investments that could be made under the agreement to extend to sectors not covered by article III(a).

[84] *Australia-Indonesia Bilateral Investment Treaty* art III 'scope of agreement'; *ASEAN-Australia-New Zealand Free Trade Agreement* art 1 'scope'; The preamble to the BIT recalls 'that investments of investors of one Party in the territory of the other Party would be made *within the framework of laws of the latter Party*'. Similarly, article III first sentence of the BIT clarifies

In particular, investments in Indonesia must be made pursuant to the *Law no. 25/2007 concerning Capital Investment*.[85] According to that law, foreign investment is any investing activity for the purposes of 'running a business in Indonesia', with use of foreign capital.[86] Furthermore, any foreign investment must be made through a limited liability company incorporated under Indonesian law.[87] As Indonesian company law requires that limited liability companies have at least two shareholders,[88] the company must also effectively be a joint venture. In Indonesia, 'investments' are also subject to the Negative Investment List (NIL).[89] The current NIL leaves open FDI in the construction and installation of electric power supply (above 10MW) and transmission (with up to 95% foreign ownership, or 100% for PPPs) and of high voltage electric power utilization (49%) and electric power installation and maintenance (95%).[90]

IV. COMMON FEATURES OF PUBLIC INTERNATIONAL ECONOMIC LAW

Minimum Standard of Treatment afforded to investment

International Investment Agreements usually oblige host states to meet certain absolute standards set out in the agreement. These standards are subject to ongoing debate among legal practitioners and scholars and their application by arbitral tribunals has been the subject of public controversy. The following paragraphs provide a brief overview of this debate.

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that investments shall be admitted to the state 'in accordance with its laws, regulations and investment policies applicable from time to time'. "Investments" are defined as those invested "and admitted" by the relevant party in accordance with such laws, regulations and policies.

[85] *Undang-Undang Republik Indonesia no. 25 tahun 2007 tentang Penanaman Modal* [Republic of Indonesia Law no. 25/2017 concerning Capital Investment] (Indonesia) 26 April 2007, 2007 LN 67, TLN 4724 ('*Law no. 25/2017 concerning Capital Investment*') article I (Definitions), III(1)(a) (Scope of Investment). This law replaced the previous *Law no. 1 of 1967 concerning Foreign Investment* which is stated in the treaty.

[86] Ibid art 1(3).

[87] Ibid art 5(2).

[88] *Undang-Undang Republik Indonesia no. 40/2007 tentang Perseroan Terbatas* [Republic of Indonesia Law No. 40 of 2007 on Limited Liability Companies] (Indonesia) 16 August 2007, 2007 LN 106, TNL 4756 ('*Law No. 40 of 2007 on Limited Liability Companies*') art 7(1).

[89] *Law no. 25/2017 concerning Capital Investment* art 12.

[90] *Peraturan Presiden Republik Indonesia no. 44/2016 tentang Daftar Bidang Usaha yang Tertutup dan Daftar Bidang Usaha yang Terbuka dengan Persyaratan di Bidang Penanaman Modal* [Presidential Regulation of the Republic of Indonesia no. 44/2016 concerning the List of Closed Business Sectors and the List of Open Business Fields subject to Requirements in the Field of Investment] (Indonesia) 18 May 2016, LNRI 97 ('*The 2016 Negative Investment List*'). Ibid.

Commonly these treatment standards are expressed as the obligation to accord 'fair and equitable treatment' (FET) and 'protection and security' to investments. It is a matter of interpretation whether the standards of 'FET' and 'protection and security' have the same or distinct meanings, although scholars have argued for the latter.[91] BITs also commonly introduce a standard of protection against arbitrary or discriminatory conduct. This is usually expressed as an obligation to avoid 'impairing' an investment by unreasonable or discriminatory measures,[92] the so called 'non-impairment standard.'[93]

As these standards are not usually defined in the treaty, arbitral tribunals also refer to Customary International Law (CIL) to determine the minimum level of protection required, also known as the Minimum Standard of Treatment (MST). Customary international law is drawn from the practice of states and *opinio juris*, or the acceptance by States that such practice is required by law.[94] It is therefore binding upon states as part of international legal custom. Commentators note the relationship between standards written into treaties and MST under CIL is unclear.[95] CIL is generally understood to provide a *minimum* standard. It follows that tribunals will construe 'FET' as requiring higher levels of investor protection where the relevant treaty does *not* limit FET to the customary MST. However, as we discuss further below, legal opinion varies as to whether 'bare' or unqualified FET clauses in treaties are the same as the customary MST.

[91] See, eg, Christoph Schreuer, 'Protection against arbitrary or discriminatory measures' in Catherine A Rogers and Roger P Alford (ed), *The future of investment arbitration* (Oxford University Press, 2009) 183; Rumana Islam, 'Interplay between Fair and Equitable Treatment (FET) Standard and Other Investment Protection Standards' (2014) 14(1-2) *Bangladesh Journal of Law* 117.

[92] See eg Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol, signed 23 August 1995, [1994] ATS 4 (entered into force 11 January 1997) ('*Australia-Argentina Bilateral Investment Treaty*') art 4 (2): 'Each Contracting Party shall, subject to its laws, grant full legal protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments through unjustified or indiscriminate measures.'

[93] *Saluka Investments BV v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17th March 2006) cited in Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 87, 89.

[94] *Statute of the International Court of Justice* art 38.

[95] Heiskanen, above n 93, 89. See also discussion of the standards of treatment in *El Paso Energy International Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No. ARB/03/15, 31 October 2011) ('*El Paso (Award)*').Ibid.

Interpretation of the 'FET' standard and the Minimum Standard of Treatment under Customary International Law

Scholarship on the FET standard has largely drawn upon arbitral decisions concerning the interpretation of the FET, and there is limited analysis of what governments consider forms part of the MST under CIL.[96] Nevertheless, a growing body of trade treaties refer to an MST in accordance with CIL.[97]

Interpretations of the MST and FET vary between arbitral tribunals. Some influential decisions set a very high bar; for example, in the *Neer Case* it was held that the MST standard will be infringed only by conduct equivalent to 'an outrage, to bad faith, to wilful neglect of duty or or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'[98] Tribunals have also been seen to adopt much looser formulations of the MST however, including that of 'reasonableness'.[99] Similarly, drawing on tribunal decisions, academic commentators have proposed lists of norms that they assert are contained within the FET standard[100] and these appear to create several substantive obligations on governments,[101] including for example, 'the protection of investor confidence or legitimate expectations'.[102]

On the other hand, drawing on the *North American Free Trade Agreement* ('NAFTA') context, Gaukrodger observes that NAFTA states regard the MST as a *minimum* standard which sets a *high bar* to determine breach. For example, NAFTA governments consider the standard offers

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[96] See David Gaukrodger, 'Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law' (OECD Working Papers on International Investment no. 2017/03, OECD, 2017).
[97] See for example, *ASEAN-Australia-New Zealand Free Trade Agreement*.
[98] *L. F. H. Neer and Pauline Neer (U.S.A.) v United Mexican States (Award)* (1926) 4 RIIA 60 ('*Neer (Award)*'); ibid: "[t]he property of governmental acts should be put to the test of international standards…the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."
[99] See, eg, *Merrill & Ring Forestry v Canada (Award)* (ICSID Arbitral Tribunal, ICSID Case No. UNCT/07/1, 31 March 2010) ('*Merrill & Ring Forestry v Canada*').
[100] See generally David Gaukrodger, above n 95, 14.
[101] See, eg, Stephan Schill, 'Fair and Equitable Treatment as an Embodiment of the Rule of Law' in R. Hofmann & C. Tams (ed), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years*, Schriften zur Europäischen Integration und Internationalen Wirtschaftsordnung (Nomos, 2007) 31, 133-34, cited in David Gaukrodger, above n 95. For example, based on tribunal decisions Stephan Schill has elaborated seven principles as part of the FET standard, including '(1) the requirement of stability, predictability and consistency of the legal framework; (2) the principle of legality; (3) the protection of investor confidence or legitimate expectations; (4) procedural due process and denial of justice; (5) substantive due process or protection against discrimination and arbitrariness; (6) the requirement of transparency; and (7) the requirement of reasonableness and proportionality'.
[102] Schill, above n 100.

protection against denial of justice (for example, in proceedings brought before domestic courts), however that a 'violation of administrative law' and a failure to provide a stable legal environment would *not* be sufficient to breach the standard.[103] According to NAFTA governments, the MST does not create a rule protecting investor's legitimate expectations,[104] even where those expectations are based on government assurances such as contracts.[105] However, there may be some limited protection of an investor's legitimate expectations in certain circumstances, such as where these are assessed objectively[106] or there is some other clause in the treaty which provides that contracts made between governments and investors shall be enforceable.[107] The NAFTA governments' view is that the MST does not create a general prohibition on arbitrary conduct by governments, nor does it create an obligation of transparency on governments. At most, these views suggest an acceptance of protection against a denial of justice and a limited protection from 'manifest arbitrariness', discrimination or arbitrary conduct related to a denial of justice or other rule of CIL, as part of the customary MST. While more research is necessary, these views suggest that the minimum protection afforded under CIL could be substantially less than that suggested by arbitral tribunals and scholars.

The Minimum Standard of Treatment afforded under IIAs between Australia and Indonesia

The AANZFTA

The AANZFTA obliges the host government to accord FET and 'full protection and security.' Article 6 (2)(c) shows that this standard is clearly not greater that that accorded under the CIL MST.[108] Indeed the agreement specifically defines the FET as requiring that parties 'ensure justice in legal and administrative proceedings'[109] – which is in line with the narrow

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[103] See also *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic (Final Award)* (ICSID Arbitral Tribunal, Case No. ARB/14/3, 27 December 2016) ('*Blusun S.A*'); ibid [4]. The tribunal noted that the customary MST preserves the authority of the state to make laws and regulations to adapt to changing circumstances, subject to its obligation to respect any specific commitments it has made to an investment.

[104] David Gaukrodger, above n 95, 42-45.

[105] Ibid 42.

[106] See, eg, Canada's Counter-Memorial in *Clayton and Bilcon of Delaware Inc. v Government of Canada (Award on Jurisdiction and Liability)* (Permanent Court of Arbitration, Case No. 2009-04, 17 March 2015) cited in David Gaukrodger, above n 95, 46 n 146; see also *Saluka (Partial Award)* (Permanent Court of Arbitration, 17th March 2006) 307; *El Paso (Award)* (ICSID Arbitral Tribunal, Case No. ARB/03/15, 31 October 2011) [356]-[358].

[107] David Gaukrodger, above n 95.

[108] Specifically, the agreement provides that 'the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment *in addition to or beyond* that which is required under customary international law, and *do not create additional substantive rights*' (emphases added).

[109] *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11 art 6(2)(a).

interpretation frequently adopted by arbitral tribunals. However, Indonesia has indicated that sub-section (c) will not apply where Indonesia is the state according treatment under this article.[110] By reserving the operation of subsection (c), Indonesia has not explicitly provided for a level of investor protection greater than CIL, nor has it precluded a tribunal from awarding it. As such investments in Indonesia, a tribunal may interpret that the FET obligation of the GOI requires, at a minimum, the protection afforded to investors under CIL. However, **Gaukrodger (2017) has observed that '[t]he purpose and effect of these provisions for Indonesia is not clear.'**[111]

The Australia-Indonesia BIT

The Australia-Indonesia BIT provides for 'FET' seemingly unqualified by CIL. On the one hand this may suggest a higher level of protection. However, this is unclear as there is still much uncertainty as to what the content of the customary MST is, and whether it is distinct from other treaty-based standards. Gaukrodger has observed a 'remarkable development' in international investment law whereby 'bare' FET clauses are interpreted as setting an 'autonomous' standard, distinct from and unqualified by the MST under CIL.[112] On the one hand, some commentators have proposed that such 'autonomous' clauses potentially broaden the scope for interpretation and 'rule making' afforded to arbitral tribunals,[113] through which tribunals could 'ensure fairness in different contexts.'[114] On the other hand, some tribunals have concluded that the content of autonomous FET and the MST-FET are essentially the same.[115]

The BIT also provides for 'protection and security' of investments and obliges the host country not to 'impair the maintenance, use and enjoyment or disposal of investments' subject to the laws of the host country.[116] 'Non-impairment' obligations are common in

[110] Ibid n 6.
[111] David Gaukrodger, above n 95, 40.
[112] Ibid 10.
[113] Ibid 13 and sources cited therein.
[114] Ibid.
[115] Ibid 15-16.
[116] *Australia-Indonesia Bilateral Investment Treaty* art II(3). The clause reads: 'A Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.' This obligation is relatively broad but is subject to a closed list of activities (those cited in the provision), although these would extend to activities both pre and post establishment of the investment.

many BITs,[117] however usually include a reference to arbitrary and discriminatory conduct. The non-impairment clause in the BIT, rendered in this way without direct reference to arbitrary or discriminatory conduct, is similar to clauses in roughly half of Australia's bilateral investment agreements.[118] **At the time of writing, two separate cases are pending before arbitral bodies under two of these agreements[119] however no other cases shed light on the interpretation of this provision.**

There is limited coverage of the meaning of the term 'impair' in arbitral decisions,[120] although it has been understood to entail a reduction in the possible exercise of a right.[121] Furthermore, even though the clause does not refer to arbitrariness the 'FET' standard itself likely prohibits arbitrariness.[122] Tribunals have found unreasonable or arbitrary conduct where a state has not been able to demonstrate a 'reasonable relationship' between its conduct and a rational policy objective.[123] As discussed above, while some scholars argue the non-impairment standard is customary,[124] there is little evidence from State practice and *opinio juris* that it forms part of the customary MST.[125] Some tribunals and scholars (drawing upon tribunal decisions) have considered that the non-impairment obligation forms part of the FET, or that that FET is broader than the others, so a breach of the FET standard would also encompass 'full protection and security' and 'non-impairment.'[126]

A similar obligation contained within the FET provision under the ECT obliges host states not to 'impair by unreasonable or discriminatory measures [the] management, use, enjoyment or disposal' of investments.[127] In relation to that provision, and similar provisions in other

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[117] Patrick Dumberry surveyed 365 BITs, and found that 197 contained a 'non-impairment' standard. Patrick Dumberry, 'The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 15(1-2) *The Journal of World Investment & Trade* 117, 143 & 119 n 6.
[118] See Australia's BITs with the following countries: Czech-Republic, Egypt, Hungary, India (terminated), Laos, Pakistan, Peru, Poland, Romania, Sri Lanka, Uruguay and Vietnam.
[119] *Tantalum International Ltd. and Emerge Gaming Ltd. v Arab Republic of Egypt (Pending)* (ICSID Arbitral Tribunal, Case No. ARB/18/22); *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan (Pending)* (ICSID Arbitral Tribunal, Case No. ARB/12/1).
[120] Andrew Paul Newcombe and Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (Kluwer Law International, 2009) 300.
[121] Ibid citing the *OECD Draft Convention on the Protection of Foreign Property*, signed 12 October 1967, 7 ILM 117 Art 1, note 6.
[122] UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements no. II, UNCTAD, 2012) 29.
[123] *Saluka (Partial Award)* (Permanent Court of Arbitration, 17th March 2006) [460].
[124] See e.g. Heiskanen, above n 92; Dumberry, above n 116, 141 n 146.
[125] Dumberry, above n 116, 141.
[126] Ibid 144 and sources cited therein.
[127] *The Energy Charter Treaty* art 10(1).

Investment Agreements, arbitral tribunals have indicated that in the absence of a specific undertaking as to stability, the FET standard will not necessarily protect an investor from legal instability arising from a change of law that may cause detriment to the investment.[128] This is provided that the State acts in accordance with the requirements of natural justice and does not breach other treaty standards. For example, in a separate case brought under a BIT between Turkey and the United States, an ICSID tribunal found a 'roller-coaster' effect of legislative changes contributed, among other reasons including serious abuse of ministerial authority, to a finding of a breach of the FET standard.[129] However legislative changes alone were not a deciding factor in that case.

The issue of predictability of the regulatory environment is particularly relevant for investment in the renewable energy sector, which may be highly dependent on the availability of certain incentives such as regulated feed-in-tariffs and tax breaks. The FET standard, including the protection and security and non-impairment obligation, and the prohibition on expropriation contained within IIAs all ostensibly lend support to foreign investors that will be necessary to enable significant investment in the renewable energy transition in the Asia-Pacific region. Unfortunately, the extent of protection afforded by these standards is still the subject of much debate, and so far, investment arbitration has not provided a sufficiently certain basis for investors, especially in the renewable sector.[130]

Protection under IIAs and the MST: The Example of Legal Stability for FDI in Indonesia

Indonesia provides an interesting context to consider the issue of legal stability for FDI. The Indonesian legal system is quite complex, having been shaped by pre and post-colonial influences that have resulted in a legally pluralist society.[131] Within the hierarchy of

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[128] See e.g., *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v Kingdom of Spain (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/36, 4 May 2017) ('*Eiser v Spain*'); See generally Yulia S Selivanova, 'Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases' (2018) *ICSID Review-Foreign Investment Law Journal* 1.

[129] *PSEG Global Inc. The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (Award)* (ICSID Arbitral Tribunal, Case No. ARB/02/5, 19 January 2007) ('*PSEG Global Inc. v Turkey*').

[130] Selivanova, above n 127.

[131] Tim Lindsey has described it as 'a complex amalgam of several different legal systems'; Tim Lindsey, *Indonesia: law and society* (Federation Press, 2nd ed, 2008) 3.

Indonesian laws, higher level laws (Undang-Undang) are often written in general terms, laying out basic principles that are fleshed out further in subsequent implementing regulations, such as Government Regulations and Ministerial Regulations. The latter, especially in the energy sector, can be subject to frequent revision, which can be a source of significant uncertainty for foreign investors. Furthermore, implementing regulations can also suffer from lack of detail, creating legal lacunae with respect to the rights of investors in domestic regulations.

There is also the issue of regional autonomy. Under the autonomy law[132] *subnational governments are responsible for the provision of infrastructure and capital investment services.*[133] *Overlapping regulations, non-transparent licensing procedures and other administrative issues associated with decentralization have often created obstacles to foreign investment in Indonesia.*[134] *However, pursuant to Article 25(4) of the ICSID Convention, Indonesia has notified the ICSID that the class of disputes relating to administrative decisions issued by regency/municipality governments (Pemerintah Kabupaten) may not be submitted for arbitration to the Centre.*[135] *This is in accordance with a presidential decree issued in 2012.*[136]

There is real potential for instability and lack of clarity in Indonesian laws and regulations governing investments in the energy sector. However, it is unclear whether the IIAs between Australia and Indonesia would provide recourse to damages for investors for unanticipated regulatory change that may 'impair' or otherwise damage the investment.

Domestic Content Laws on in electricity in Indonesia

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[132] *Undang-Undang Republik Indonesia no. 32/2004 tentang Pemerintahan Daerah* [Republic of Indonesia Law no. 32/2004 concerning Local Government] (Indonesia) 15 August 2004, 2004 LN 125, TLN 4437 ('*Regional Autonomy Law*'). This law replaces the Law No.22/1999.
[133] Ibid arts 13, 14.
[134] See generally KPMG, 'Investing in Indonesia' (KPMG, 2015) 5, 38; PWC, 'Doing Business in Indonesia' (PWC, 2012) 10.
[135] International Centre for the Settlement of Investment Disputes, 'Notification Concerning Classes of Disputes Considered Unsuitable for Submission to the Centre' (ICSID/8-D, Date of Notification: September 27, 2012) 2.
[136] *Keputusan Presiden Republic Indonesia no. 31/2012 tentang Perselisihan Yang Tidak Diserahjan Penyelesaiannya Kepada Yuridiski International Centre for Settlement of Investment Disputes* [Presidential Decree no. 31/2012 concerning Disputes the resolution of which may not be handed over to the jurisdiction of the International Centre for the Settlement of Investment Disputes] (Indonesia) 22 September 2012.

Indonesia maintains domestic content standards for electricity sector projects that win a tender at auction, such as government projects, in accordance with domestic laws and Ministry of Industry Regulations.[137] *While the significance of Ministerial regulations are generally accepted to lie at the lower end of the hierarchy of laws,*[138] *higher laws, including the Energy Law, Electricity Law and Industrial Law, all mandate the prioritization of local content.*[139] *It is unclear whether such limitations would be applied to the transmission infrastructure necessary for an electricity trading project such as the AREH project. However, the AREH project has proposed to invest in manufacturing capacity within Indonesia to construct and assemble components to be used for the project in Indonesia.*[140] *This suggests that domestic content standards may not present a significant barrier to investment in this particular case.*[141] *In terms of tariffs, Indonesia has committed to not charging any import tariffs on electrical energy.*[142]

Prohibition on Expropriation

Prohibition on expropriation is a fundamental component of the international investment legal regime, including the Australia-Indonesia BIT and the AANZFTA. These agreements, like most other modern agreements, prohibit direct and indirect nationalisation or expropriation of investments by the host government.[143] Direct nationalisation refers to the transformation of private property into public property, usually on a large or sector specific scale, while expropriation often refers to takings on a property or enterprise specific basis.[144] 'Measures

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137 *Peraturan Menteri Perindustrian Republik Indonesia no. 54/M-IND/PER2/2017 Perubahan Atas Peraturan Menteri Perindustrian Republik Indonesia no. 54/M-IND/PER/3/2012 Tentang Pedoman Penggunaan Produk Dalam Negeri Untuk Pembangunan Infrastruktur Ketenagalistrikan* [Ministry of Industry of the Republic of Indonesia Regulation 05/M-IND/PER/2/2017 amending the Ministry of Industry Regulation no. 54/M-IND/PER/3/2012 concerning the use of Local Content in Electricity Infrastructure Development] (Indonesia) (13 February 2017) BN 275.

138 *Ketetapan MPR No. III Tahun 2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-Undangan* [People's Consultative Assembly of the Republic of Indonesia Decree no. III/2000 on The Source of Law and Hierarchy of Laws] (Indonesia) (18 August 2000). Confusingly, Ministerial Regulations do not appear in the hierarchy at all, and there is some contention as to their position with respect to regional laws. See Lindsey, above n ; ASEAN Law Association, *Legal System in Indonesia, chapter 2, Legal System* <https://www.aseanlawassociation.org/legal-indonesia.html>.

139 *Undang-Undang Republik Indonesia no. 30/2007 tentang Energi* [Republic of Indonesia Law no. 30/2007 concerning Energy] (Indonesia) (10 August 2007) 2007 LN 96, TLN 4746 ('*Law no. 30/2007 concerning Energy*') art 9; *Undang Undang Republik Indonesia no. 30/2009 tentang Ketenagalistrikan* [Republic of Indonesia Law no. 30/2009 concerning Electricity] (Indonesia) 23 September 2009, 2009 LN 133, TLN 5052 ('*Law no. 30/2009 concerning Electricity*') arts 16, 17, 28; *Undang-Undang Republik Indonesia no. 3/2014 tentang Perindustrian* [Republic of Indonesia Law no. 5/2014 concerning Industry] (Indonesia) (15 January 2014) 2014 LN 4, TLN 5492 ('*Industrial Law no. 5/2014*') arts 85-90.

140 Asian Renewable Energy Hub, *About the Asian Renewable Energy Hub* < https://asianrehub.com/about/>.

141 Ibid.

142 *ASEAN-Australia-New Zealand Free Trade Agreement* Annex, Tariff schedule no. 1874.

143 *Australia-Indonesia Bilateral Investment Treaty* art VI ; *ASEAN-Australia-New Zealand Free Trade Agreement* art 9.

144 United Nations Conference on Trade and Development, 'Expropriation: A Sequel' (UNCTAD, 2012).

having equivalent effect' as nationalization or expropriation on investments are also prohibited. While no definition of 'equivalence' is provided in either agreement, definitions can be found in international case law. In the *Starrett Housing* case*,* it was stated that

> measures taken by a State can interfere with property rights *to such an extent that these rights are rendered so useless* that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[145]

However certain takings will be lawful provided that they take the form of non-discriminatory regulatory actions designed and applied to achieve legitimate public purpose, such as the protection of public health, are non-discriminatory, have been taken 'under due process of law' *and* are accompanied by adequate and effective compensation.[146] The distinction between lawful and unlawful expropriation is important as it affects the rules applicable to compensation for expropriation.[147] **Importantly, and controversially, compensation even for lawful expropriation under most international investment agreements is provided based on the market value of the investment.[148]**

Value of compensation required in the Australian-Indonesia BIT

Under the Australia-Indonesia BIT, compensation is the 'market value' of the investment 'immediately before' the expropriation 'became public knowledge'.[149] However, it further provides that where this value cannot be easily ascertained, compensation should be based on 'generally recognised principles of valuation and equitable principles' including 'the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.' Compensation under the AANZFTA is the 'fair market value' when or immediately before the expropriation was announced publicly, or 'when the

[145] *Starrett Housing Corporation et al. v The Government of the Islamic Republic of Iran (Interlocutory Award)* (1983) 4 Iran-United States Claims Tribunal Reports 122 ('*Starrett Housing v Iran*'); See also, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic (Decision on Liability) (ICSID Arbitral Tribunal, Case No. ARB/03/17, 30 July 2010) ('Suez et al. v Argentina (Decision on Liability)').*
[146] *Australia-Indonesia Bilateral Investment Treaty* art VI(1); *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11, art 9.
[147] *Amoco International Finance Corporation v Islamic Republic of Iran (Award)* (1988) 27 I.L.M 1320, 82 [192] ('*Amoco v Iran*').
[148] *Australia-Indonesia Bilateral Investment Treaty* art VI(2).
[149] Ibid art VI(2).

expropriation occurred, whichever is applicable'.[150] *The stronger reference to market value c.f. costs of investment mean compensation will generally be higher under the FTA than under the BIT. As the BIT contains a MFN provision,*[151] *it is relevant to note that Indonesia has signed other BITs with third countries which are currently in force and provide for fair market value compensation.*[152] *As such, investors may have recourse to compensation under that standard instead of the one set in the Australia-Indonesia BIT. In several cases, arbitral tribunals have been willing to import a less restrictive provision from third-country BITs based on MFN clauses,* [153] *and have even imported entirely new provisions from third-country BITs that are non-existent in the BIT that is the basis of the investment dispute.*[154] *The Indonesian Investment law also obliges the GOI to pay 'market-price' compensation for any nationalisation by law.*[155] *No specific reference is made however, to international arbitration if there is a dispute over the amount of the compensation.*

Investor-State Dispute Settlement

The key role of private sector actors in this landscape has been influenced by the ability for private investors to make claims against governments through investor-state dispute settlement (ISDS).[156] ISDS is an increasingly popular international private investment protection mechanism, inserted into the investment chapters of free trade agreements and bilateral investment treaties. Provision for international arbitration of disputes may also be found in contracts between autonomous parties. An early reference to ISDS was included in an

[150] *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11 art 9(2)(b). The provision also neutralizes any potential depreciation in the market value due to the intended appropriation becoming known earlier than these times. 'The Compensation… not reflect any change in value because the intended expropriation had become known earlier': art 2(c).
[151] As noted above in fn 129, the MFN clause does not extend to treatment under a free trade area, which rules out compensation for "fair market value" under the AANZFTA.
[152] See, eg, *Agreement Between the Government of the Czech Republic and the Government of the Republic of Indonesia for the Promotion and Protection of Investments*, opened for signature 17 September 1998, [2014] OJ C 169/1 (entered into force 21 June 1999) art 4(c).
[153] See especially, *CME Czech Republic B.V. v Czech Republic (Final Award)* (2003) 15 World Trade and Arbitration Materials 83 ('*CME Czech Republic (Final Award)*').
[154] See generally Suzy H. Nikièma, 'The Most-Favoured-Nation Clause in Investment Treaties' (IISD Best Practices Series, International Institute for Sustainable Development, February 2017) 11.
[155] *Undang-Undang Republik Indonesia no. 25/2007 tentang Penanam Modal* [Law of the Republic of Indonesia no. 25/2007 concerning Foreign Investors] (Indonesia) 26 April 2007, 2007 LN 67, TLN 4724 ('*Investment Law no. 25/2007*') art 7(2). Market price in this case is based on an independent appraisal consistently with internally accepted methods.
[156] Yulia Selivanova, 'Interconnections in Energy Transportation: Implications for International Trade Law' in Thomas Cottier & Ilaria Espa (Eds.) (ed), *International Trade in Sustainable Electricity: Regulatory Challenges in International Economic Law* (Cambridge University Press, 2017) 193.

agreement between the Netherlands and Kenya in 1970,[157] not long after the establishment of the International Centre for Settlement of Investment Disputes (ICSID) in 1966.[158] ISDS is designed to provide a framework for private investors to seek compensation where they have or would in future suffer damage to their investments caused by arbitrary or capricious action by a host government. Increasingly, ISDS cases are focused on the economic impact of public policies on protected FDI.[159]

The ICSID Convention does not permit arbitration between two States, as such States cannot bring a claim under ISDS provisions, and this is limited to 'a national of another contracting state.'[160] Similarly, BITs conventionally limit access to arbitration to an 'investor' of a contracting party.[161] However, the position of state-owned enterprises (SOEs) is slightly different. SOEs may incur international state responsibility if they are 'acting as an agent for the government or … discharging an essentially governmental function'.[162] However, where they are not so acting, they may also be characterised as 'a national of another contracting state', for the purposes the ICSID Convention. Unfortunately, arbitral tribunals have provided limited guidance on how State-State and Investor-State disputes should be distinguished under the ICSID Convention. Feldman argues that such a determination should consider not only the 'commercial or governmental nature' of the entities' activities, but also of the commercial or governmental *purpose* of those activities.

Investor State Dispute Settlement in Investment Agreements Between Indonesia and Australia

Both the BIT and the AANZFTA provide for dispute settlement through diplomatic and political channels (consultations and negotiations) as a first step. Failing this, the BIT provides that

[157] *Agreement on economic co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya*, opened for signature 11 September 1970, 166 Officiële Publicatie (Treaty Series) 1970 (entered into force 11 June 1979) art 11.
[158] *ICSID Convention*.
[159] Tienhaara and Downie, above n 71, 452.
[160] *ICSID Convention* art 25(2).
[161] Mark Feldman, 'The Standing of State-Owned Entities Under Investment Treaties' in Karl P. Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press, 2013) 631.
[162] Aron Broches, 'The ICSID Convention on the Settlement of Investment Disputes between States and Nationals of other States' in Academie de Droit International de la Haye (ed), *Recueil des cours / Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff, 1972) 331, 354-355; Feldman, above n 160.

states that the investor 'may submit' 'a dispute' for settlement a) in accordance with the laws of the host country OR b) to the International Centre for Settlement of Investment Disputes (ICSID) for conciliation or arbitration.[163] *This applies for disputes 'between a Party and an investor of the other Party relating to an investment.'*[164] *If both parties are not also parties to the ICSID Convention, the parties may choose an alternative procedure, however, if no agreement is reached between the parties as to the forum for dispute settlement, the BIT provides that the parties will 'be bound to submit' the dispute for arbitration under UNCITRAL rules. Similarly, the AANZFTA lays out a graduated process for investment related dispute settlement. Failing initial consultations for dispute resolution,*[165] *a disputing investor may submit a claim*[166] *for conciliation or arbitration under international dispute settlement rules,*[167] *for recourse to damages, restitution, and costs.*[168] *The provision for ISDS covers disputes that arise from a breach of certain provisions of the treaty*[169] *by a disputing party (government), which cause loss or damage to the investment.*[170] *Unlike the BIT, the FTA provides a statute of limitations period of 3 years from the time a reasonable investor would have become aware of the breach.*[171]

Investment Protection and International Arbitration Under the ECT

The ECT prima facie seeks to reduce commercial risks posed to private foreign investments by creating a non-discriminatory 'level playing field'[172] for energy sector investments within the sovereign territories of its Contracting Parties. The protection of commercial energy sector investments from political and regulatory risks such as expropriation[173] is effectively

[163] *Australia-Indonesia Bilateral Investment Treaty* art XI.
[164] Ibid art XI(1).
[165] *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11 art 19.
[166] Ibid art 21.
[167] ICSID Convention and the *ICSID Rules of Procedure for Arbitration Proceedings, or* ICSID Additional Facility Rules, *or* under the UNCITRAL Arbitration Rules or under any other arbitration institution *or* rules agreed to by the investor.
[168] *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11 art 28.
[169] Ibid art 4 (National Treatment), art 6 (Treatment of Investment), art 7 (Compensation for Losses), art 8 (Transfers), and art 9 (Expropriation and Compensation).
[170] Ibid art 20.
[171] Ibid art 22(1)(a).
[172] *The Energy Charter Treaty* art 10 and art 1(10); Energy Charter Secretariat, 'An Introduction to the Energy Charter Treaty' in *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* (Energy Charter Secretariat, 2004) 14.
[173] Ibid art 13.

entrenched by way of Art 26 of the ECT, which establishes a binding ISDS mechanism.[174] Successful ISDS claims under the ECT provide investors with access to compensation in accordance with the relevant award, which is always 'final and binding'[175] upon the parties to the dispute.

Art 26 allows an investor of a Contracting State to take legal recourse against another Contracting State where the latter allegedly breaches a substantive obligation or obligations under Part III of the Charter, including the obligation not to directly or indirectly expropriate a covered investment.[176] If an aggrieved investor chooses to submit its dispute for resolution under the ECT's ISDS mechanism,[177] they will be presented with a choice of arbitration rules.[178]

With respect to the scope of protection granted by the ECT, 'investment', 'investor' and 'the making of investments' are defined broadly in the Charter,[179] and have been construed accordingly in establishing standing and admissibility in arbitral proceedings[180] (though it should be noted that legal precedent is not a feature of arbitration). 'Investor' is defined by the ECT to include a natural person, company or other organisation permanently residing in or organised in accordance with the laws of a Contracting Party.[181] Paired with an equally broad definition of 'investment', which means '*every kind* of asset, owned or controlled directly or indirectly by an Investor'[182] associated with an Economic Activity in the Energy Sector,[183] a **not insignificant proportion of ECT ISDS disputes are raised by multinational equity**

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174 *The Energy Charter Treaty* art 26(8).
175 Ibid art 26(8).
176 Ibid art 26(1).
177 Other fora include the courts or administrative tribunals of the Contracting Party to the dispute or a previously agreed dispute settlement procedure, if applicable; *The Energy Charter Treaty* art 26(2).
178 Any of the rules under the Washington Convention for the Settlement of Investment Disputes between States and Nationals of Other States establishing the International Centre for the Settlement of Investment Disputes (ICSID), ICSID Additional Facilities Rules, the United Nations Commission on International Trade Law (UNCITRAL) Ad hoc Rules or the Arbitration Rules of the Stockholm Chamber of Commerce can apply: *The Energy Charter Treaty* art 26(4). There is a general preference among Contracting Parties for ICSID arbitration: Deborah Ruff, Julia Belcher and Charles Golsong, 'Energy Charter Treaty: Coming up for 20 years' (Report, Norton Rose Fulbright, 2014).
179 *The Energy Charter Treaty* art 1(6)(a)-(f).
180 See, eg, the arbitral tribunal's discussion on the meaning of "investment" in *Petrobart Ltd v The Kyrgyz Republic (Award)* (Stockholm Chamber of Commerce, Case No. 126/2003, 29 March 2005).
181 *The Energy Charter Treaty* art 1(7).
182 This includes, but is not limited to, leases, mortgages, liens or pledges; a company or business enterprise; shares, stock or other forms of equity participation; intellectual property; returns; licencing rights; and claims to money or performance pursuant to a contract having an economic value and that is associated with a covered investment: ibid art 1(6).
183 Ibid.

funds and holding companies rather than by energy companies with foreign energy sector investments.[184]

The ECT is also the only multilateral agreement containing an ISDS mechanisms that does not have a statute of limitations period.[185] **This is significant as it means that investors are not prevented from bringing a claim against a Contracting Party in ten, thirty, fifty or even one-hundred years into the future; posing a considerable risk to governments which may find it both ideologically and/or logistically difficult to defend the actions of their predecessors that far into the future.**[186]

Tienhaara and Downie (2018) highlight a growing concern that 'incumbent energy producers in the fossil fuel industries will use ISDS provisions to try to stall action on climate change.'[187] This concern stems predominantly from the fact that ISDS disputes are increasingly arising under the ECT in response to the introduction of new public policies that aim to support the uptake of zero-carbon energy technologies and/or curb the expansion of fossil fuels.[188] In this regard, the ECT can be considered something of an impediment to the clean energy transition. The ECT's investment protection mechanism also runs a genuine risk of resulting in 'regulatory chill'; a concern worthy of further analysis in the developing country context.[189]

Enforcement of foreign arbitral awards

Where a party to an international agreement has obtained an award from an international dispute settlement tribunal, the award rendered is of limited practical value if the losing party fails to honour it. Aside from the potential for persuasion and reputational pressure to sway a recalcitrant loser, the ability to enforce an award becomes a relevant issue for investors who seek to rely on international dispute settlement provisions in international agreements.

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[184] See, eg, *Libananco Holdings Co. Limited v Republic of Turkey (Decision on Preliminary Issues) (ICSID Arbitral Tribunal, Case No. ARB/06/8, 23 June 2008) ('Libananco (Decision on Preliminary Issues');.Ibid; CSP Equity Investment S.à.r.l. v Spain (Pending)* (Permanent Court of Arbitration, Case No. 094/2013)

[185] Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, 'Dispute Settlement provisions in international investment agreements: A large sample survey' (OECD International Investment Working Paper No. 21/2, OECD, November 2012) .

[186] See Jonathan Bonnitcha, N. Skovgaard Poulsen Lauge and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 1 ed, 2017) 6–11.

[187] Tienhaara and Downie, above n 71, 2.

[188] Tienhaara and Downie, above n 71, 7.

[189] Ibid 2.

Enforcement mechanisms within international treaties define limited circumstances in which local courts can refuse to recognise and enforce an award.[190] For example under the ICSID Convention, unless enforcement of an award has been stayed pursuant to the Convention,[191] States are obliged to recognize and enforce and award within its territory 'as if it were a final judgment of a court in that State.'[192] However the question of enforcement often comes down to the law of the place in which enforcement is sought, which is usually where the losing party has assets.[193]

In the past domestic courts have prevented the execution of arbitral awards against States, based on the doctrine of sovereign immunity from executions.[194] If this were the case, a State could grant diplomatic immunity to its investor and pursue the claim on its behalf by bringing an international claim against the defaulting State.[195] However, as Choi points out, States may be reluctant to become involved in disputes for political reasons, which was a key motivation for the development of the ICSID convention in the first place.[196]

Enforcement of Foreign Arbitral Awards in Indonesia

[190] See, eg, *ICSID Convention* art 52 (annulment); *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*'); ibid art V (national review); United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc A/RES/40/72 (11 December 1985) annex I, art 34; see generally Peter Gillies, 'Enforcement of International Commercial Arbitration Awards - the New York Convention' (2004) 9 *International Trade and Business Law Review* 19; Susan Choi, 'Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions' (1995) 28 *New York Journal of International Law and Politics* 175.

[191] Art 52 sets out the limited conditions in which a State may request annulment of an award. "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." A decision of the tribunal is only subject to the appeal mechanisms set out in the Convention, as such, domestic courts cannot review ICSID awards.

[192] *ICSID Convention* art 54(1).

[193] Choi, above n 189.

[194] See, eg, *ICSID Convention* art 54; see generally Choi, above n 189.

[195] See, eg, *ASEAN-Australia-New Zealand Free Trade Agreement* art 22(3); 'No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which has been submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this Paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.' See *ICSID Convention* art 27.

[196] Choi, above n 189, 214.

Both Indonesia and Australia are parties to the ICSID; Indonesia having ratified the Convention in 1968.[197] *Indonesia has also ratified the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*[198] *by which Indonesia undertakes to recognise and enforce all foreign arbitral awards*[199] *relating to disputes of a commercial nature between private parties, made in other contracting states to the convention and in accordance with Indonesian laws.*[200] *This includes investment activities, and would include commercial activities performed by Indonesian SOEs.*

Foreign arbitral awards in which the Republic of Indonesia is a party to the dispute, can only be executed within Indonesia after the Indonesian Supreme Court has issued an exequatur (writ of execution) certifying the enforceability of the award.[201] *This authority is delegated by the Arbitration Act to the Central Jakarta District Court.*[202] *The requirement for domestic registration of a foreign arbitral award clearly applies for commercial/ad hoc arbitration and also to awards rendered by the ICSID tribunal.*[203] *The broad description of foreign arbitral awards in the Indonesian Arbitration Law – that a foreign arbitral award is any that is issued by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia*[204] *- also suggests that these domestic provisions apply to awards rendered by the ICSID Tribunal. Notably, Indonesia and Australia have not included any waiver of sovereign immunity against execution in the two investment agreements considered in this paper.*

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[197] *Undang-Undang Republik Indonesia no. 5/1968 tentang Penyelesaian Perselisihan Antara Negara dan Warganegara Asing Mengenai Penananam Modal* [Republic of Indonesia Law no. 5/1968 concerning the Settlement of Disputes Between Indonesia and Foreign Countries about Investment] (Indonesia) 29 June 1968, 1968 LN 32, TLN 2852 ('*Law no. 5/1968 concerning International Dispute Settlement*').

[198] *Peraturan Presiden Republik Indonesia no. 34/1981 tentang Pengesahan "Convention on the Recognition and Enforcement of Foreign Arbitral Awards"* [Presidential Decree no. 34/1981 concerning the ratification of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards"] (Indonesia) (5 August 1981) LN 40 ('*Presidential Regulation no. 34/1981 ratifying the New York Convention*'); *Peraturan Mahkamah Agung Republik Indonesia no. 1/1990 tentang Tata Cara Pelaksaan Putusan Arbitrase Asing* [Supreme Court of Indonesia Regulation no. 1/1990 concerning the Proceedure for Implementation of Foreign Arbitral Awards] (Indonesia) (1 March 1990) ('*Supreme Court of Indonesia Regulation no. 1/1990*').

[199] Foreign awards are those that are issued outside of Indonesian territory; *Undang-Undang Republik Indonesia no. 30/1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa* [Republic of Indonesia Law no. 30/1999 concerning Arbitration and Alternative Dispute Resolution] (Indonesia) 12 August 1999, 1999 LN 138, TLN 3872 ('*Indonesian Arbitration Law 1999*') art 1(9).

[200] *New York Convention* art III. Indonesian Arbitration Law requires that the nationality of the disputing party should also derive from a state that is a party to the Convention.

[201] *Indonesian Arbitration Law 1999* art 66(e); *Law no. 5/1968 concerning International Dispute Settlement* art 3(1).

[202] *Indonesian Arbitration Law 1999*.

[203] *Law no. 5/1968 concerning International Dispute Settlement* art 3(1).

[204] *Indonesian Arbitration Law 1999* art 1(9) '*…awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrators(s) which under the provisions of Indonesian law are deemed to be International arbitration awards*'.

Some commentators argue the practice of enforcement of foreign (commercial) arbitral awards in Indonesia has been inconsistent, although these appear largely to relate to private commercial arbitrations.[205] *Nevertheless, the same legal mechanisms apply for enforcement of ISDS awards. Observers note that the enforcement of foreign awards can be a time-consuming process,*[206] *especially where Indonesian debtors commence protracted annulment proceedings to effectively delay payment of a debt.*[207] *Despite provisions to the contrary, domestic courts have at times involved themselves in matters over which they have no jurisdictional competence.*[208]

Jurisdictional issues - Extent of ISDS coverage under ICSID Arbitration

Consent to ICSID arbitration may be established through a clause establishing agreement to arbitration in contracts, as well as under an investment law, among others.[209] As the tribunal's jurisdiction to hear a dispute arises under the ICSID Convention in association with the applicable agreement,[210] the relevant activity must also objectively constitute an "investment" for the purposes of the ICSID Convention. As no definition has been provided in the ICSID Convention, it has been understood in terms of the test put forth in *Salini* v *Morocco*,[211] although a precise definition of has largely eluded tribunals.[212] The *Salini* test has largely operated to exclude purely 'commercial' transactions such as contracts for sale and purchase,

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[205] Noah Rubins, 'The enforcement and annulment of international arbitration awards in Indonesia' (2004) 20 *American University International Law Review* 359.

[206] Rob Palmer and Baldev Bhinder, *Enforcement of foreign arbitral awards in Indonesia: Ashurst Singapore Client Briefing* (September 2014) <https://www.ashurst.com/en/news-and-insights/legal-updates/enforcement-of-foreign-arbitral-awards-in-indonesia/>; Karen Mills, 'Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration' (Paper presented at Kuala Lumpur, 1 March 2003 Inaugral International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators).

[207] Tony Budidjaja, *Arbitral Awards: Enforcement Challenges in Indonesia* (27 May 2017) Asia-Pacific Forum for International Arbitration < http://afia.asia/2017/05/arbitral-awards-enforcement-challenges-in-indonesia/>

[208] Fifi Junita, 'Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia' (2008) 5 *Macquarie Journal of Business Law* 369; *Indonesian Arbitration Law 1999* art 3 states that 'The District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement.

[209] See generally, Alan Redfern and Martin Hunter, *Law and practice of international commercial arbitration* (Sweet & Maxwell, 4 ed, 2004).

[210] *Société Générale de Surveillance S.A. v Republic of the Philippines (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB/02/6, 29 January 2004) ('*Société Générale v Philippines*'). Ibid.

[211] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco (Decision on Jurisdiction)* (2003) 42 I.L.M. 609 ('*Salini*'); ibid 620 [44], 624 [63]. That test looks for the presence of four criteria, i.e. 'contributions, a certain duration of the performance of the contract and a participation in the risks of the transaction… contribution to the economic development of the host State…' [52]. Tribunals will assess an investment in terms of these four criteria, which may be met to varying extent, to determine whether there is an 'investment'.

[212] *Global Trading Resources Corp and Globex International, Inc v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/09/11, 1 December 2010) ('*Global Trading v Ukraine*') 18 [55] cited in August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 *Asia Pacific Law Review* 3, 21 n 76.

which have not been deemed to be an investment.[213] Historically 'investment' has been understood more restrictively by ICSID tribunals than by international commercial tribunals.[214] Commercial arbitral tribunals have generally accepted jurisdiction to hear disputes concerning a broader range of commercial and contractual rights. However, authors have also observed a convergence between the notions of 'investment' adopted in arbitration under these fora.[215]

Scope of "investment" under Agreements between Australia and Indonesia

The Indonesia-Australia BIT includes a broad subject matter definition of disputes for which an investor may have recourse to ISDS, covering disputes 'relating to an investment'. Thus, the BIT appears to cover a broad range of disputes which may extend to any dispute between a foreign investor and the GOI, whether grounded in provisions of the treaty or private contract, that give rise to a claim under the BIT.[216]

The scope of the ISDS clause under the investment chapter of the AANZFTA extends to disputes that relate directly to a breach of certain standards prescribed under the agreement,[217] *including the obligations to accord FET and not to expropriate the investment. This suggests a tribunal would have jurisdiction to hear these 'treaty-based claim[s]'*[218] *but not separate*

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[213] Ibid 21.
[214] Walid Ben Hamida, 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control – Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo' (2007) 24(3) *Journal of International Arbitration* 287. For example, arbitration through the International Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or ad hoc arbitration under UNCITRAL arbitration rules.
[215] See e.g., Anna Turinov, '"Investment" and "Investor" in Energy Charter Treaty Arbitration: Uncertain Jurisdiction' (2009) 26(1) *Journal of International Arbitration* 1; Thomas W Wälde and Todd Weiler, 'Investment arbitration under the Energy Charter Treaty in the light of new NAFTA precedents: Towards a global code of conduct for economic regulation' (2003) 1(2) *Oil, Gas & Energy Law Journal (OGEL)* citing Bruno Poulain, 'L'investissement international: définition ou définitions?' in Philip Kahn and Thomas W. Wälde (eds), *Les aspects nouveaux du droit des investissements internationaux [New Aspects of International Investment Law]* (Martinus Nijhoff, 2007) 123, 126.
[216] Several decisions have found a breach of a commercial contract to give rise to a breach of a BIT. See eg, *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic (Decision on Annulment)* (2004) 6 ICSID Reports 340 ('*Vivendi*') 357 [60]; *Lanco International, Inc. v The Argentine Republic* (Decision on Jurisdiction) (2001) 40 ILM 457 ('*Lanco*') 463 [16]; *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, Switzerland-Pakistan BIT, (Decision of the Tribunal on Objections to Jurisdiction)* (2003) 18 ICSID Rev 307) ('*Société Générale v Pakistan*'); *Impregilo SpA v Islamic Republic of Pakistan, (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/3, 22 April 2005) ('*Impregilo*') 84 [258].
[217] To bring a claim, the disputing investor must demonstrate that the disputing party has breached certain obligations under the treaty: *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11 art 20(a) '…that the disputing Party has breached an obligation arising under article 4 (National treatment); article 6 (Treatment of Investment), article 7 (Compensation for Losses), article 8 (Transfers), and article 9 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment' and; article 20 (b) this has caused loss or damage to the investor/investment).'
[218] See e.g. *Joy Mining Limited v Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/11, 6 August 2004) ('*Joy Mining*'); ibid 20 [82] cited in Reinisch, above n 211, 9.

claims arising in private contract. However, as discussed above, the FET standard can be interpreted broadly and therefore could give rise to a wide range of claims.

Jurisdictional issues – Consent to Arbitration

The jurisdiction of ICSID Tribunal is predicted on the written consent of states to arbitration.[219] The issue of whether and when consent is established is not clearly defined by the Convention itself. Commentators point to the *travaux préparatoires* of the Convention which indicate that consent could be through a state's unilateral declaration of acceptance to ICSID's jurisdiction, for example through the provisions of national legislation or an investment law.[220] However the parameters establishing consent will depend on terms of the offer and acceptance by the investor.[221] For example, in an case brought against Indonesia before a tribunal established under the ICSID Convention, for a claim arising under the UK-Indonesia BIT, the tribunal rejected Indonesia's claim that 'admission' in the context of Indonesian investment law should be construed as 'a continuous process whereby a foreign investor violates the admission requirement when engaging in activities that are not covered by the terms of the BKPM [investment licence] approval.'[222] The Tribunal found that admission in the context of the agreement should be understood as a 'one-time occurrence'.[223] This suggests that as long as an investment has been made and admitted in accordance with the prevailing laws, it will likely avail of the protection of the treaty.

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[219] *ICSID Convention* art 25(1).
[220] Christoph Schreuer, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press, 2001); Redfern and Hunter, above n 209; Jan Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Review - Foreign Investment Law Journal* 232; Baiju S. Vasani and Anastasiya Ugale, 'Travaux Préparatoires and the Legitimacy of Investor-State Arbitration' in Eric De Brabandere et al (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill, Nijhoff In ed, 2015) 150.
[221] Christoph Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in Michael Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 353.
[222] *Churchill Mining PLC v Republic of Indonesia (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB/12/14, 24 February 2014) ('*Churchill (Decision on Jurisdiction)*') [245].
[223] Ibid [289].

V. RELEVANT INVESTOR-STATE DISPUTES

The following section reviews relevant cases brought under the ECT, and the Australia-Indonesia BIT. The outcome of these case raises important issues for investors seeking to rely on ISDS protection under these agreements.

Disputes under the ECT

The number of disputes lodged by foreign private investors against Contracting States under the ECT's ISDS mechanism has grown exponentially over the past five years; 75 proceedings were filed between 2013 and 2017, compared to just 19 cases between 1998 and 2008.[224] While at first instance Art 26 may seem highly beneficial to private energy sector investors, a closer look at its operation in the context of the renewable energy sector reveals that ISDS could constitute a barrier to the timely transition toward zero-carbon energy.[225] This risk stems primarily from the fact that non-renewable investors are increasingly lodging disputes under the ECT for policies that support renewable energy uptake, and arbitral awards for breach typically range in the order of billions to tens of billions of US dollars.[226] There is also a very real possibility that States are being discouraged from taking certain policy actions on account of ISDS risks under the ECT.[227] *Vattenfall v Germany (II)* clearly illustrates the tension that exists between investor rights and public policies that protect the interests of the general public.

The Vattenfall (II) Case

In 2012, Vattenfall, a large Swedish utility company, launched its second ISDS arbitration claim against Germany under Art 26 of the ECT (*Vattenfall II*).[228] The proceedings were triggered by Germany's introduction of new nuclear phase-out laws: a response to the

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224 Tienhaara and Downie, above n 71, 451.
225 Ibid.
226 See, eg, *Hulley Enterprises Limited v Russian Federation, (Final Award)* (2014) ICGJ 480; (Permanent Court of Arbitration, 18th July 2014) ('*Hulley Enterprises (Final Award)*'); *Libananco Holdings Co. Limited v Republic of Turkey, (Annulment Proceedings)* (ICSID Arbitral Tribunal, Case No. ARB/06/8, 22 May 2013) ('*Libananco (Annulment Proceedings*'); *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany (Award)* ICSID Arbitral Tribunal, Case No. ARB/09/6, 11 March 2011 ('*Vattenfall (Award)*').
227 For an interesting discussion on regulatory chill, see Bonnitcha, Lauge and Waibel, above n 186, ch 9; CF Stephan W. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) *Journal of International Arbitration* 469.
228 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany (Request for Arbitration)* ICSID Arbitral Tribunal, Case No. ARB/09/6, 17 April 2009 ('*Vattenfall (Request for Arbitration)*').

Fukushima nuclear disaster that accorded with latest IPCC recommendations.[229] These amendments, which will enter into force in 2020, prevent Vattenfall from continuing to operate two of its existing nuclear power plants. The German Government did not agree to provide compensation for financial losses.[230] Vattenfall is alleging that the forced closure of these reactors amounts to an indirect expropriation of their investments under the ECT, and also constitutes a failure to accord the company fair and equitable treatment (FET).[231] While no documents from the proceedings have been published to date – a fact that has been criticised for leaving the German public 'in the dark' over a decision that could affect their welfare[232] – the amount sought is believed to be in the order of around 4.4 billion USD for past and future revenue losses.[233] This matter, while ongoing at the time of writing, highlights the significant tension that exists between the expansion of domestic environmental policies and the operation of international investment law (which naturally favours investors),[234] and the consequent need for new international trade and investment rules that genuinely support a clean energy future.

Indonesia as a respondent in ISDS claims

Indonesia has been a respondent to seven ISDS claims under the ICSID rules since 2004, including two pending before tribunals at the time of writing.[235] Overall, Indonesia has not fared badly in these claims, with two being decided in favour of the state, one claim decided in favour of neither party, one discontinued claim and one settled claim. That case concerned the alleged de-facto expropriation by the GOI of an option to purchase a majority stake in an Indonesian cement company, Semen Gresik.[236] The investor, Mexican cement company Cemex trading in the region under Cemex Asia Holdings Ltd, brought the claim under the ASEAN

[229] Amélie Noilhac, 'Vattenfall v Germany (II) and the familiar irony of ISDS: Investors before public interest?' (2015) (July–September) *Association for International Arbitration: Corporate Disputes* .
[230] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'The State of Play in Vattenfall v Germany II: Leaving the German Public in the Dark' (IISD Briefing Note, December 2014) 2.
[231] Noilhac, above n 228.
[232] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, above n 229.
[233] Ibid 2.
[234] Ibid 5.
[235] International Centre for the Settlement of Investment Disputes, *Cases Database* (2018) <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.
[236] *Cemex Asia Holdings Ltd v Indonesia (Award embodying the parties' settlement agreement)* (ICSID Arbitral Tribunal, Case No. ARB/04/3, 23 February 2007) ('*Cemex*').

Investment Treaty (1987)[237] *after the GOI failed to issue the option, which had lapsed due to local community opposition to foreign take-over of the Indonesian firm. The ICSID Arbitration tribunal was considering jurisdictional objections raised by Indonesia when the parties settled, reportedly in a bargain for the sale of other cement assets to Cemex, in return for Cemex withdrawing its claim.*[238]

One of the first ICSID cases (in 1985) to which Indonesia was a respondent concerned an expropriation issue and also considered the issue of denial of justice at customary international law.[239] *That case concerned the expropriation of the assets of a foreign owned company incorporated in Indonesia (PT Amco Indonesia), by the company's local business partner, which was owned by a cooperative of the Indonesian military.*[240] *After the initial award (in favour of Amco) was annulled, the second arbitral award also found in favour of Amco. It found that the conduct of the army and police forces in physically taking over a hotel run by Amco, and the denial of justice afforded to Amco through the revocation of its investment license by the Investment Board, were acts of international wrongdoing attributable to the Republic of Indonesia.*[241]

Investor-State Disputes under the Australia-Indonesia BIT – Jurisdictional issues

The decisions discussed under this subheading indicate that provisions for ISDS in Investment Agreements, such as BITs, may not automatically establish State consent to international arbitration. In the context of Indonesia, such consent has been established by clauses within Foreign Capital Investment Approvals. Thus, consent to arbitration will depend on the precise terms of the relevant agreements.

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[237] This treaty has been replaced with the *ASEAN Comprehensive Investment Agreement*, opened for signature 26 February 2009, ASEAN Legal Instruments (*entered into force 24 February 2012)* available at <http://agreement.asean.org/home/index/7.html>.
[238] International Institute for Sustainable Development, (2005) *INVEST-SD: Investment Law and Policy Weekly News Bulletin* <<http://www.iisd.org/itn/wpcontent/uploads/2010/10/investment_investsd_jan10_2005.pdf>>.
[239] *Amco Asia Corporation and others v Republic of Indonesia (Award)* (1985) 24 I.L.M. 1022 ('*Amco (1985 Award)*').
[240] Oxford Public International Law, *Max Planck Encyclopedia of Public International Law* (at April 2007) Amco v Indonesia Case, <http://opil.ouplaw.com.virtual.anu.edu.au/view/10.1093/law:epil/9780199231690/law-9780199231690-e1781>.
[241] *Amco Asia Co v Republic of Indonesia* (*Resubmitted Case: Award of 31 May 1990)* (1993) 1 ICSID Rep 569 ('*Amco (1990 Award)*').

A recent case decided in favour of Indonesia, was brought to an ICSID tribunal under the UK-Indonesia BIT[242] (the *Churchill Mining* case). A separate proceeding with an Australian company owned by Churchill, *Planet Mining Pty Ltd*[243] was also brought under the Australia-Indonesia BIT, and was consolidated into the *Churchill* proceeding.[244] Planet and Churchill alleged violations of the FET, expropriation and denial of justice causing damages of around USD 2.5 billion.[245] Whilst the claims in *Churchill* and *Planet* were ultimately dismissed following a finding that the licenses which formed the basis of the claims had been forged,[246] the decisions raise important issues concerning the jurisdiction of arbitral tribunals to hear ISDS claims against Indonesia.

The issue revolved around the interpretation of the provisions of the BIT establishing the jurisdiction of the ICSID tribunal to hear a claim. Paragraph 2 of Article XI of the BIT states that in the event of a dispute 'the investor...may submit the dispute, for settlement (a) in accordance with the laws and regulations of the party which has admitted the investment...or...(b) to the International Centre for the Settlement of Investment Disputes...'. By contrast, establishing consent to arbitration under the AANZFTA is comparatively straightforward. The Treaty provides that a dispute is deemed to have been submitted to the relevant arbitral body provided the investor has fulfilled the requirements relating to the submission of a dispute as laid out in the treaty.[247]

Planet Mining argued that Indonesia's advanced consent was granted in Article XI. Conversely, Indonesia contested the jurisdiction of the ICSID Centre to hear both disputes relating to *Churchill Mining* and *Planet Mining Pty Ltd,* respectively under the UK- Indonesia and Australia-Indonesia BITs. Indonesia claimed the provision in the Australia-Indonesia BIT, that a party 'shall consent in writing […] within forty-five days',[248] did not constitute automatic

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[242] *Churchill (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB/12/14, 24 February 2014).
[243] *Planet Mining Pty Ltd v Republic of Indonesia (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/12/40, 24 February 2014) ('*Planet Mining (Decision on Jurisdiction)*').
[244] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia (Award)* (ICSID Arbitral Tribunal, Case No. ARB/12/14 and 12/40, 6 December 2016) ('*Churchill and Planet (Award)*').
[245] Planet Mining Pty Ltd, Submission No. 174 to the Joint Standing Committee on Treaties, *Inquiry regarding the Trans-Pacific Partnership*, 23 March 2016, 3.
[246] *Churchill and Planet (Award)* (ICSID Arbitral Tribunal, Case No. ARB/12/14 and 12/40, 6 December 2016), 191 [528].
[247] *ASEAN-Australia-New Zealand Free Trade Agreement* ch 11 art 21(2).
[248] *Australia-Indonesia Bilateral Investment Treaty* art XI(4).

consent.[249] Indonesia contended that it retained the right to grant consent once it was satisfied that the jurisdictional requirements of the treaty had been fulfilled, i.e. pursuant to the requirement in the treaty that the investment was admitted according to the relevant laws, which it argued the investment was not. Furthermore, in response to the claimant's reliance on its Investment Licence (BKPM approval) as a source of consent to ICSID arbitration, Indonesia asserted that based on Indonesian law, only the President has the authority to grant consent for ICSID arbitration.[250]

The tribunal found against the claimant on the point of advanced consent and agreed with Indonesia that Article XI of the Australia-Indonesia BIT only contains a promise to consent[251] which itself is insufficient to enliven the jurisdiction of the ICSID tribunal.[252] In order to establish consent, a further act by Indonesia granting consent would be necessary.[253]

The tribunal followed the process of treaty interpretation as laid out in the Vienna Convention on the Law of Treaties.[254] It found the ordinary meaning of the words in the provision were quite clear, and that in light of their context, the provision did not contain Indonesia's advanced consent.[255] Doctrinal writings supported this conclusion although the tribunal noted none of these referred to extrinsic materials and simply relied on the text and context of the agreement.[256]

The tribunal also turned to supplementary means of interpretation,[257] and considered both Australian and Indonesia's treaty practice with third countries. It noted that Indonesia had provided its advanced consent in 60 out of 64 BITs.[258] The tribunal found several points to be persuasive and appeared to affirm the tribunal's conclusions based on the text of the treaty. Firstly, based on Indonesian treaty practice, the Australia-Indonesia BIT appeared not to follow

[249] This view has been shared by other commentators whose commentary was relied upon by Indonesia in its submissions. *Planet Mining (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/12/40, 24 February 2014) 33 [110] and footnotes.
[250] Ibid 37 [118-119].
[251] Ibid [167], [173], [198].
[252] Ibid [171].
[253] Ibid [198].
[254] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*') arts 31, 32.
[255] *Planet Mining (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/12/40, 24 February 2014) [173].
[256] Ibid [181].
[257] *VCLT* art 32.
[258] *Planet Mining (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/12/40, 24 February 2014) [186].

the policy otherwise adopted consistently by Indonesia since the 1990s of securing access to international arbitration for foreign investors.[259] Secondly, the tribunal was persuaded that the Australian practice was to deliberately distinguish between advanced consent and a promise to consent.[260] It is notable that the tribunal found that, in the absence of *travaux préparatoires* which might shed futher light on the meaning, the text of the treaty also produces the result that absent Indonesia's consent under Article XI(4)(a), the investor would also be barred from UNCITRAL arbitration.[261]

Nevertheless, the jurisdiction of the Tribunal was established however under two Investment Approval Letters (BKPM approvals) granted to the investor by the Indonesian Investment Co-ordinating Board, in 2005 and 2006. The tribunal interpreted the relevant section of the 2005 approval letter, in which the 'Government of the Republic of Indonesia' expressed its 'readiness/preparedness/willingness to follow' the settlement provisions of the ICSID Convention' in accordance with provisions of the 1968 Investment Law,[262] to be an expression of consent that satisfied the ICSID requirement of consent in writing.[263]

The 2005 approval was originally granted to a separate company[264] which was acquired by Planet Mining Pty Ltd and Churchill Mining in 2006, and a subsequent BKPM approval was issued in 2006 which incorporated the terms of the 2005 approval.[265] However the tribunal found that the consent to arbitration contained in the approvals extended to the wider enterprise and therefore the shareholders of PT ICD, including Planet Mining Pty Ltd.[266] Furthermore, as the text of the treaty[267] suggested that granting of consent could be done in advance of the investor filing a claim to the Centre,[268] the BKPM approval established the requirement for written consent under section XI(4) of the treaty.[269]

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[259] Ibid [187].
[260] Ibid [188]-[195].
[261] Ibid [169].
[262] *Law no. 5/1968 concerning International Dispute Settlement*.
[263] *Planet Mining (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/12/40, 24 February 2014); see also *Churchill (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB/12/14, 24 February 2014) [238].
[264] PT ICD Perseroan Terbatas (ICD Pty Ltd).
[265] *Planet Mining (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/12/40, 24 February 2014) [207].
[266] Ibid [212].
[267] *Australia-Indonesia Bilateral Investment Treaty* art XI(4)(a).
[268] *Planet Mining (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/12/40, 24 February 2014) [201]-[203].
[269] Ibid 217.

This finding reflects the tribunal's conclusion in the adjacent proceedings brought by a UK investor, Churchill Mining Pty Ltd.[270] In *Churchill*, while the tribunal found that Indonesia had provided advanced consent to ICSID arbitration under the UK-Indonesia BIT, it also indicated that it would have found consent in the BKPM Foreign Capital Investment Approval Letters.[271] This was consistent with a prior decision of the ICSID arbitral tribunal in *Amco* (discussed above), which found that consent within the meaning of the *ICSID Convention*, could be given to foreign investors through domestic instruments such as contracts and licences (BKPM investment approval license).[272] In that case, the tribunal reasoned that the provision of consent to international arbitration necessarily extended to foreign investors and not just their domestic subsidiaries. This is because based on Indonesian Investment Law, the foreign investor (Amco Asia) could only realize its investment through an Indonesian subsidiary (PT Amco). Similarly, the tribunal found that the Indonesian Government's intention desire to avail itself of the same facility to arbitrate disputes through the ICSID was manifest in various written documents.[273]

VI. CONCLUSION

This paper started from three premises: that a rapid transition toward renewable energy in the Asia-Pacific is going to be an essential component of efforts to avert catastrophic climate change; that private involvement in international investment and trade in renewable energy has an important role to play in enhancing the speed and efficiency of the energy transition and in meeting growing energy demand; and that political risk can be an important deterrent to private investment – particularly when up-front costs of investment are high and assets can be stranded by host-government action. On this basis, it has investigated the potential for existing international public economic law to support private involvement in in international investment and trade in renewable energy in the Asia Pacific.

The paper has surveyed relevant existing instruments of public international economic law, and noted the most pertinent aspects – both substantive and procedural – of this body of law. Trade rules, such as those encapsulated in the WTO's General Agreement on Tariffs and Trade were observed to suit the needs of the renewable energy industry poorly, and we join other authors

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[270] *Churchill (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB/12/14, 24 February 2014).
[271] Ibid [238].
[272] *Amco Asia Corporation and others v Republic of Indonesia*, *(Decision on Jurisdiction)* (1984) 23 I.L.M. 351 ('*Amco (1983 (Decision on Jurisdiction)*') 368 [23], 369 [24].
[273] Ibid 369 [24].

in seeing a need for development of rules specific for energy trade. Though we have not seen formal legal analysis on the topic, our reading of the law is that similar limitations with regard to energy trade apply to regional trade rules, such as those in the AANZFTA.

The most important procedural component of public international economic law in our context is undoubtedly investor-state dispute settlement (ISDS), which allows foreign investors to bring disputes with host governments to international arbitral tribunals. Jurisdiction of these arbitral panels was observed to be hotly contended in some cases – particularly those involving Indonesia. Of the substantive clauses in these international agreements, minimum standards of treatment, especially fair and equitable treatment (FET) was observed to be one of those most favoured by investors and most contested by host governments and legal scholars alike. Altogether, the diversity of drafting and interpretation of the existing body of law does not appear to provide a particularly high level of certainty to either investors or host governments.

Whilst the *Energy Charter Treaty* (ECT) is ostensibly a multilateral treaty specifically designed to protect and promote international investment and trade in energy, it does not appear to be a tool supportive of renewable energy expansion in the Asia-Pacific. Firstly, key Asia-Pacific countries – including Australia, Indonesia and Singapore – have not ratified the treaty. Secondly, and perhaps more importantly, the ECT has been used more often to challenge renewable energy promotion laws and policies than to support renewable investments.

Our overall conclusion is that the existing body of international economic law is not particularly supportive of either governments considering policy innovation to support investment in renewable energy, or of private investors considering renewable energy projects in the Asia-Pacific. The challenge ahead, is to identify feasible alternatives that can do better.

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Agreement Between the Government of the Czech Republic and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, opened for signature 17 September 1998, [2014] OJ C 169/1 (entered into force 21 June 1999)

Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, opened for signature 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010)

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